80-240

No.

Supreme Court, U. S.
FILED
AUG 18 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980.

JERE JONES, FRED KORN and DAVID MASSIE,
Petitioners,

vs.

JOHN W. KNELLER, individually and as President of Brooklyn College, SHERMAN VAN SOLKEMA, individually and as former Vice-President and Provost of Brooklyn College, ETHYLE R. WOLFE, individually and as Dean of the School of Humanities, Brooklyn College, SALVATORE CANNAVO, PAUL EDWARDS, GERTRUDE EZORSKY, EDWARD KENT, ARNOLD KOSLOW, ROBERT SCHWARTZ, PAUL TAYLOR, individually and as present and former voting members of the Appointments Committee of the Philosophy Department at Brooklyn College, DONALD R. REICH, individually and as Vice-President and Provost of Brooklyn College, and ROBERT GROSSMAN, individually and as Grievance Officer and Special Assistant to the President of Brooklyn College for Legal Affairs,

Respondents.

JERE JONES, FRED KORN and DAVID MASSIE,
Petitioners,

vs.

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK, HAROLD JACOBS, as Chairman of the Board of Higher Education, and ROBERT KIBBEE, as Chancellor of the City University of New York,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

MORTON ALPERT
Attorney for Petitioners
217 Broadway
New York, N. Y. 10007
(212) 349-2000

ALPERT & O'ROURKE
Of Counsel

August 11, 1980

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980.

JERE JONES, FRED KORN and DAVID MASSIE,

Petitioners,

vs.

JOHN W. KNELLER, individually and as President of Brooklyn College, SHERMAN VAN SOLKEMA, individually and as former Vice-President and Provost of Brooklyn College, ETHYLE R. WOLFE, individually and as Dean of the School of Humanities, Brooklyn College, SALVATORE CANNAVO, PAUL EDWARDS, GERTRUDE EZORSKY, EDWARD KENT, ARNOLD KOSLOW, ROBERT SCHWARTZ, PAUL TAYLOR, individually and as present and former voting members of the Appointments Committee of the Philosophy Department at Brooklyn College, DONALD R. REICH, individually and as Vice-President and Provost of Brooklyn College, and ROBERT GROSSMAN, individually and as Grievance Officer and Special Assistant to the President of Brooklyn College for Legal Affairs,

Respondents.

JERE JONES, FRED KORN and DAVID MASSIE,

Petitioners,

vs.

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK, HAROLD JACOBS, as Chairman of the Board of Higher Education, and ROBERT KIBBEE, as Chancellor of the City University of New York,

Respondents.

Petition for a Writ of Certiorari To The United States Court of Appeals For The Second Circuit.

Questions Presented For Review.

Where the Court of Appeals for the Second Circuit affirmed the decision of the District Court granting respondents' motion under Rule 12 (b) (6) F. R. Civ. P. to dismiss the amended complaint for failure to state a claim upon which relief can be granted:

1. Does the First Amendment and 42 U.S.C. §1983 protect untenured teachers from denial of re-employment by a public university for views expressed in a departmental debate over the best way to teach educationally disparate students in an open-admissions program?

2. Does a contractual right to pre-termination of employment review procedures implicate the Fourteenth Amendment for untenured teachers who claim that they were denied re-employment because the decision makers conducting the procedures were infected by bias in violation of federal due process?

3. If a valid claim is stated against respondents, should this consolidated action also be remanded for trial against the governmental entity, Board of Higher Education of the City of New York, to permit evidentiary development of petitioners' allegations that it was implicated in the deprivation of their First and Fourteenth Amendment rights?

Table of Contents.

	Page
Questions Presented For Review	ii
Parties	1
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions	1
Statement	2
Reasons for Granting the Writ	5
Conclusion	8

Index to Appendix.

Appendix A	1a
Appendix B	3a
Appendix C	20a
Appendix D	53a

Table of Authorities.

CASES.

	Page
Board of Regents v. Roth, 408 U. S. 564 (1972)	7
Eichman v. Ind. State Univ. Bd. of Trustees, 597 F. 2d 1104 (7th Cir. 1979)	6
Gibson v. Berryhill, 411 U. S. 564 (1973)	7
Givhan v. Western Line Consol. School District, 439 U. S. 410 (1979)	5, 6
Hortonville Joint School District No. 1 v. Hortonville Education Association, 426 U. S. 482 (1976)	7
In re Murchison, 349 U. S. 133 (1955)	7
Mt. Healthy City Board of Education v. Doyle, 429 U. S. 274 (1977)	5, 6
Perry v. Sindermann, 408 U. S. 274 (1977)	5, 7
Pickering v. Board of Education, 391 U. S. 563 (1968)	5, 6, 7
Scheuer v. Rhodes, 417 U. S. 232 (1974)	6

STATUTES.

Civil Service Law §203, McKinney's Consol. Laws of N. Y.	2
Rule 12 (b) (6) F. R. Civ. P.	2, 3

Page

28 U. S. C. §1254 (1) 1

28 U. S. C. §1343 2

42 U. S. C. §1983, 17 Stat. 13 ..... 2, 3

42 U. S. C. §1985(3) 3

OTHER AUTHORITIES.

U. S. Constitution:

Amendment I 1

Amendment XIV 1

Parties.

The names of the parties are as indicated in the caption of the case in this Court.

Opinions Below.

The opinion of the Court of Appeals for the Second Circuit is unreported as yet and appears in Appendix A, *infra*. The opinion of the United States District Court for the Eastern District of New York is reported at 482 F. Supp. 204 (1979) and appears in Appendix B, *infra*.

Jurisdiction.

The judgment of the Court of Appeals was rendered and entered on May 21, 1980 (Appendix A, p. 1a). This petition for certiorari was filed within 90 days from that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Constitutional and Statutory Provisions.

UNITED STATES CONSTITUTION.

Amendment I:

> "Congress shall make no law * * * abridging the freedom of speech."

Amendment XIV:

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law * * *."

STATUTES AND RULES.

Title 42 U. S. C. §1983, 17 Stat. 13:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Rule 12 (b) (6) F. R. Civ. P.:

> "* * * the following defenses may at the option of the pleader be made by motion:
>
> "* * * (6) failure to state a claim upon which relief can be granted. * * *"

Civil Service Law §203, McKinney's Consol. Laws of N.Y.:

> "Public employees shall have the right to be represented by employee organizations to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and the administration of grievances arising thereunder."

Statement.

The jurisdiction of the United States District Court for the Eastern District of New York was invoked under Title 28 U. S. C. §1343 to bring these actions under the First

and Fourteenth Amendments and Title 42 U. S. C. §§ 1983 and 1985 (3). After filing and service of a complaint[1] against the individual respondents, a second complaint was filed and served against the Board of Higher Education of the City of New York and its officials which contains substantially identical allegations to the earlier one.[2] The actions were consolidated and dismissed by the District Court pursuant to Rule 12 (b) (6) F. R. Civ. P.[3] The Court of Appeals for the Second Circuit affirmed in a memorandum decision (Appendix A).

Petitioners had been untenured teachers in the Philosophy Department of Brooklyn College—part of the City University of New York—which is a public institution. They had been so employed for several years when in 1975 they were denied re-employment upon the expiration of their annual contracts. Respondents include several senior members of the Philosophy Department and officers of the College of whom some were empowered by a collective bargaining agreement (Appendix D) to evaluate and recommend petitioners for reappointment (Appendix D, pp. 55a-58a) or to conduct grievance procedures (Appendix D, pp. 58a-60a).

---

[1]An amended complaint was subsequently allowed and is reproduced in Appendix C, *infra.*

---

[2]To avoid unnecessary duplication, the second complaint is not reproduced in the Appendix.

---

[3]The Court declined to treat the motion as one for summary judgment although it referred in its opinion to a collective bargaining agreement which though not annexed to the complaint had been submitted with petitioners' brief.

The background to the lawsuit is found in the 1969 decision of the City University of New York to abandon its former stringent admissions policy in favor of one of open admissions. The resultant increase in class size and wide disparity in educational background of the student body convinced petitioners that the faculty had an obligation to adapt its teaching methods to the needs of incoming students. Consequently, although there was no college or departmental policy requiring any particular method of instruction, petitioners utilized and were vocal in advocating to their colleagues a method of instruction requiring the teachers to direct each student in the preparation of a journal—written practice at dealing with philosophical problems. This was in contrast to the traditional lecture method used by senior members of the department which, though less demanding of a teacher's time, did not, in petitioners' judgment, meet the problems of students with limited academic experience and diverse ethnic backgrounds.

Thus, a debate began within the Philosophy Department between petitioners and the tenured senior faculty represented by several respondents, spilling over to include the Administration, over the fundamental social and pedagogical question of how best to teach educationally limited students in order to promote the success of an open-admissions program.

The debate culminated in a series of retaliatory actions by the senior faculty which were calculated to cause petitioners to be denied re-employment. They acquired control of the departmental Appointments Committee and the chairmanship, thereby isolating petitioners; they tampered with petitioners' files and official evaluation materials so as to damage their candidacies for reappointment and tenure (Appendix C, p. 42a, ¶10; p. 49a, ¶52; p. 50a, ¶60);

they assigned persons known to be hostile to petitioners' pedagogic views to observe and evaluate their teaching and written work (Appendix C, p. 41a, ¶6; p. 42a, ¶8; p. 44a, ¶25; p. 45a, ¶31); they manipulated deadlines and withheld access to materials so that petitioners were hampered by insufficient preparation time for the evaluation process leading to reappointment (Appendix C, p. 41a, ¶6; p. 42a, ¶9; p. 47a, ¶44); they corrupted contractually granted evaluation and grievance procedures which they themselves conducted (Appendix C, p. 47a, ¶¶45, 47; p. 49a, ¶¶ 53, 55, 57; p. 50a, ¶60; Appendix D, pp. 55a-60a). Additional retaliatory acts are described in that portion of the amended complaint headed "Overt Acts" (Appendix C, pp. 40a-50a).

Reasons for Granting the Writ.

1. By dismissing this action at the pleading stage, the courts below fail to follow the admonition of the Supreme Court that in cases involving claims by teachers of loss of employment in retaliation for the exercise of their First Amendment rights, summary disposition without a full factual exploration of the issue is improper. *Perry v. Sindermann,* 408 U. S. 274 (1977); *Givhan v. Western Line Consol. School District,* 439 U. S. 410 (1979).

The need for trial is established not only by petitioners' entitlement to prove that they were denied re-employment in retaliation for the exercise of First Amendment rights, but also because of the complicated balancing of interest formulae enunciated by the Supreme Court in such cases as *Pickering v. Board of Education,* 391 U. S. 563 (1968); *Mt. Healthy City Board of Education v. Doyle,* 429 U. S. 274 (1977) and *Givhan v. Western Line Consol. School District, supra.* From the face of the complaint, as in most

cases of this kind, the factual elements of the balancing equation cannot be fully explored in advance of trial. The issue is not whether petitioners will ultimately prevail, but whether they are entitled to offer evidence to support their claims. *Scheuer v. Rhodes,* 417 U. S. 232 (1974).

2. This case presents an important First Amendment question of whether a departmental debate among college teachers, which subsequently involved the college administration, as to the best way to teach educationally disparate students in an open-admissions program of a publicly-supported university is constitutionally protected expression. The courts below deprecate the controversy by characterizing it as "bickering" and distinguish it from the kind of private speech afforded protection in *Givhan v. Western Line Consol. School District, supra.* Yet, the Seventh Circuit in *Eichman v. Ind. State Univ. Bd. of Trustees,* 597 F. 2d 1104 (7th Cir. 1979), applied the *Givhan* rationale to an untenured teacher's claim that he was denied employment in retaliation for circulating an interdepartmental memorandum critical of the University's practices regarding class scheduling and curriculum in its German Department.

In New York, where there is controversy over the validity of an open-admissions policy,[4] the issue of how best to teach its students is certainly as important as the debate in *Pickering* as to how much money should be spent on athletics, or in *Mt. Healthy* as to whether a school's dress code may be described to a radio station. The District Court's conclusion, based on its reading of the complaint, that the controversy was nothing more than an academic dispute with professional colleagues, was an impermissible basis for dismissal.

---

[4]See T. Gross, *Academic Turmoil: The Reality and Promise of Open Education,* Doubleday (1980).

3. This case presents an important Fourteenth Amendment question as to whether a collective bargaining agreement, sanctioned by state law,[3] which provides required steps for review, evaluation and grievances in contemplation of reappointment of untenured teachers is a constitutionally protected property interest entitling petitioners to an unbiased consideration of their candidacies for reappointment. The District Court concluded that a challenge to the procedural fairness of review procedures actually afforded petitioners would open to constitutional litigation a number of claims foreclosed by the Supreme Court in *Board of Regents v. Roth,* 408 U. S. 564 (1972), and *Perry v. Sindermann,* 408 U. S. 593 (1972).

However, this case differs from *Roth* and *Perry, supra,* in that here we have contractual provisions for evaluation and grievance procedures that must precede the final decision whether to reappoint petitioners. It is claimed that the very process by which the decision to refuse reappointment was reached was carried out in bad faith and was intentionally corrupted at each level of consideration by reason of the fact that those respondents who conducted the procedures were animated by hostility and acting in a retaliatory manner. Compare *Hortonville Joint School District No. 1 v. Hortonville Education Association,* 426 U. S. 482 (1976). See *Pickering v. Board of Education,* 391 U. S. 563, 578, n. 2 (1968). It is well established that a hearing by a biased decisionmaker violates due process. *In re Murchison,* 349 U. S. 133 (1955); *Gibson v. Berryhill,* 411 U. S. 564 (1973). Certainly, a factual hearing is required to determine petitioners' claim that the decision to terminate their employment was so infected by bias as to nullify it as a matter of federal due process.

[3]See *Civil Service Law,* §203, *McKinney's Consol. Laws of N. Y.* at page 2, *supra.*

Conclusion.

This Court should grant the petition for certiorari and hear the issues raised in this important area of civil rights.

Respectfully submitted,

ALPERT & O'ROURKE,
Attorneys for Petitioners,
217 Broadway,
New York, N. Y. 10007
(212) 349-2000

APPENDIX A.

Decision.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of May, One Thousand Nine Hundred and Eighty.

Present:

Honorable J. Edward Lumbard,
Honorable Walter R. Mansfield,
Honorable William H. Mulligan,
Circuit Judges.

JERE JONES, FRED KORN and DAVID MASSIE,

Plaintiffs-Appellants,

against

JOHN W. KNELLER, individually and as President of Brooklyn College, SHERMAN VAN SOLKEMA, individually and as former Vice-President and Provost of Brooklyn College, ETHYLE R. WOLFE, individually and as Dean of the School of Humanities, Brooklyn College, SALVATOR CANNAVO, PAUL EDWARDS, GERTRUDE EZORSKY, EDWARD KENT, ARNOLD KOSLOW,

ROBERT SCHWARTZ, PAUL TAYLOR, individually and as present and former voting members of the Appointments Committee of the Philosophy Department at Brooklyn College, DONALD R. REICH, individually and as Vice-President and Provost of Brooklyn College and ROBERT GROSSMAN, individually and as Grievance Officer and Special Assistant to the President of Brooklyn College for Legal Affairs,

Defendants-Appellees.

Dkt. No. 80-7069

Plaintiffs, former instructors in the Philosophy Department of Brooklyn College, appeal from a judgment of the United States District Court for the Eastern District of New York ordered by Judge Edward R. Neaher in his decision dated December 18, 1979, dismissing their action under the First and Fourteenth Amendments of the Constitution and 42 U.S.C. §§ 1983, 1985(3), which sought a declaration that they were unlawfully dismissed in retaliation for exercise of their constitutional rights and in violation of their First and Fourteenth Amendment rights, and other relief.

The judgment of the district court is affirmed, substantially for the reasons set forth in Judge Neaher's well-reasoned and carefully considered opinion dated December 18, 1979.

J. EDWARD LUMBARD, U.S.C.J.
WALTER R. MANSFIELD, U.S.C.J.
WILLIAM H. MULLIGAN, U.S.C.J.

APPENDIX B.

Memorandum and Order.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

JERE JONES, FRED KORN and DAVID MASSIE,

Plaintiffs.

against

JOHN W. KNELLER, individually and as President of Brooklyn College, *et al.*,

Defendants.

75 C 1898
78 C 1780

Appearances:

Alpert, O'Rourke & Alpert, Attorneys for Plaintiffs By Morton Alpert, Esq.

Allen G. Schwartz, Esq., Corporation Counsel, City of New York, Attorney for Defendants By Ilene J. Brown, Esq.

NEAHER, District Judge.

Plaintiffs are former instructors in the Philosophy Department of Brooklyn College. They have brought these civil rights actions pursuant to 42 U.S.C. §§ 1983 and 1985(3) and the First and Fourteenth Amendments, alleging that they were unlawfully dismissed because of their exercise of constitutionally protected rights. Defendants are officials and instructors of Brooklyn College ("the college"), the City University of New York ("CUNY"), of which the college is a part, and the Board of Higher Education of the City of New York ("BHE"). Plaintiffs seek compensatory and punitive damages, as well as declaratory and injunctive relief.

The amended complaint in No. 75 C 1898 is materially identical to the subsequently filed complaint in No. 78 C 1780, except for the latter's claim against BHE and its officials under *Monell v. Department of Social Services of the City of New York,* 436 U. S. 658 (1978). The actions have been consolidated for all purposes and are now before the court on defendants' motion to dismiss the complaints for failure to state a claim upon which relief can be granted pursuant to Rule 12 (b) (6), F.R.Civ.P.

At the outset, the court declines to treat the motion as one for summary judgment pursuant to Rule 56, F.R.Civ.P., on the ground that defendants' brief contains facts and arguments outside the complaints. Defendants' intention to move against the complaints under Rule 12(b) is apparent and the motion will be considered accordingly.

In this regard, the issue here is not whether plaintiffs will ulitmately prevail but whether they are entitled to offer evidence in support of their claims. *Scheuer v. Rhodes,* 416 U. S. 232, 236 (1974); *Lipsky v. Com. United Corp.,* 551 F. 2d 887, 895 (2 Cir. 1976). Therefore, all well-pleaded material allegations will be accepted as true and the complaints will be construed in favor of the complaining parties, *Cruz v. Beto,* 401 U. S. 319, 323 (1972); *Jenkins v. McKeithen,* 395 U. S. 411, 421-22 (1969),

recognizing that there cannot be a dismissal unless it appears beyond doubt that plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. *Conley v. Gibson,* 355 U. S. 41, 45-46 (1957). See generally *Scheuer v. Rhodes, supra,* 416 U. S. at 237. Applying these standards, we find dismissal appropriate.

The complaints of approximately 40 pages each recite in great detail the series of events that allegedly led to the non-renewal of plaintiffs' contracts of employment and upon which they base their claims of constitutional deprivation. The facts as alleged are related here in greater detail than is our custom since plaintiffs' claims are not readily discernible and, in fact, fall victim of literary excesses which expose the controversy between the parties as nothing more than "mere bickering" among teachers, a claim not recognized to be of constitutional magnitude.

Plaintiffs' allegations, read in their best light, reveal that the underlying disagreement between the parties originated in a difference of opinion over teaching method. Plaintiffs advocated the "journal" method of teaching, which involved periodic grading of students' journals. Defendants, on the other hand, supported the "lecture" method of instruction in which the teacher would have only infrequent examinations to grade and an occasional paper to consider. The journal method allegedly left the teachers less time to pursue scholarly endeavors than the lecture method, which allegedly encouraged the teachers' academic pursuits but sacrificed the interests of the students. Thus, the complaint alleges a fundamental disagreement over the best method of instruction in the college's philosophy department, which plaintiffs contend compelled them to voice criticism of various personalities.

One of the advocates of the journal method was Elmer Sprague, who in 1972 was vice-chairman of the philosophy department. In late spring 1972, the chairman of the

department, Martin Lean, made it known that he was going to spend a year at the University of Southern California. Defendants Salvator Cannavo, Paul Edwards, Gertrude Ezorsky, Edward Kent, Arnold Koslow and Paul Taylor, all members of the faculty, feared that if Sprague became chairman in Lean's absence the journal method would be adopted for those teaching in the department. They therefore petitioned defendant John W. Kneller, the president of the college, to conduct an election to fill the acting chairman position. Kneller stated that it was the responsibility of the president to designate an acting chairman but that he would consider the results of an informal election held by faculty members within the department. The informal election resulted in Sprague defeating Kent by a one vote margin, and he was subsequently named acting chairman by Kneller.

During Sprague's tenure as acting chairman, he engaged in various acts which resulted in alienation of the faculty defendants. For example, as acting chairman he was a member of the college-wide personnel and budget committee, which voted on the final recommendations for promotion at the college. Kent failed to receive sufficient votes to be promoted to associate professor. Cannavo, Koslow and Ezorsky all failed to gain sufficient votes to be promoted to full professors. They all blamed Sprague for their failure to gain promotions. In addition, Sprague incurred the wrath of Edwards by insisting on enforcing a school regulation which denied him the opportunity of teaching at the New School, an adult education institution in New York City.

In May 1973, elections for department chairman and membership on the appointments committee were conducted. The faculty defendants banded together and encouraged a majority of the faculty to back their candidate, Kent, for chairman. They were also successful in electing four members of their faction, Cannavo, Ezorsky, Koslow

and Taylor, to the appointments committee. By motion that carried by a vote of seven to four, with Sprague abstaining, the committee elected defendant Robert Schwartz, who would not join the faculty until the fall of 1973, to replace Ezorsky on the committee for 1973-74, since she was taking a leave of absence that year. Sprague reported the election results to Kneller but questioned whether Schwartz could properly be elected to replace Ezorsky since he was not yet a member of the faculty. He also questioned whether Kent should be confirmed as chairman. Kneller subsequently assigned defendant Sherman Van Solkema, who was vice-president and provost of the college at the time, to investigate the circumstances existing in the department and to recommend a course of action.

In May 1973, Van Solkema solicited and received views of Kent's capabilities from various members of the department, including plaintiffs, on the promise that there would be no reprisals for their candid judgments and that their reappointment and tenure applications would be decided by an outside board of review. Plaintiffs were among the faculty members who were of the opinion that the department should be placed in receivership before permitting Kent to become chairman.

Van Solkema reported the results of his investigation to Kneller and on May 31, 1973, Kneller announced that (1) Kent would only be designated as "Interim Chairman" and would not be confirmed as chairman; (2) he was appointing a search committee for a permanent chairman; and (3) Schwartz could not replace Ezorsky on the appointments committee because he was not yet a member of the faculty. Thereafter the committee decided to postpone election of Ezorsky's replacement until the following fall.

In September 1973, the committee voted for Ezorsky's replacement. Schwartz, who by that time was a member of the faculty, and Malcolm Brown, an associate professor and sympathizer of plaintiffs, each received seven votes. A

compromise was struck whereby Brown would serve as member of the committee for the fall semester and Schwartz for the spring.

At this same meeting the committee nominated two of its members to fill the five-member search committee instituted by Kneller. Cannavo and Edwards each received eight votes, while Brown and Abigail Rosenthal, also a plaintiff's sympathizer, each received six votes. Sprague asked Van Solkema to urge defendant Ethyle R. Wolfe, dean of the school of humanities of which philosophy is a department, to appoint Brown and Rosenthal so that both teaching factions of the department would be represented in the search committee. Van Solkema refused.

On October 3, 1973, Brown and plaintiff Jere Jones, who were under consideration for reappointment, were asked to submit written materials to the appointments committee. Plaintiff David Massie, who was under consideration for tenure, was not told to submit written materials until the following day. Rosenthal, who had already submitted written material, was specifically told by both Kent and Taylor not to submit five chapters of a book which she had written since the spring.

On October 5, 1973, the committee voted for reappointment of Brown, Kent, Korn, Massie, Wiseman and Caffevtzis, but against Jones, Rosenthal and Smithurst.

Jones and Rosenthal subsequently instituted grievance proceedings alleging political reprisal. Kneller granted a *de novo* hearing and designated a college review committee, to be chaired by Van Solkema, to review the records. Van Solkema selected Hildegarde Wichert Five, a close friend of Cannavo, to head a subcommittee. The subcommittee conducted an investigation and report to the full committee, which then conducted a hearing at which Sprague was permitted ten minutes to speak on behalf of Jones and Rosenthal while Kent was allowed twenty minutes to speak against them.

The review committee upheld the decision not to reappoint Jones and Rosenthal. The latter then filed a Step I grievance, which Kneller denied in January 1974. A Step II grievance resulted in an agreement between the Teachers Union and the Administration in which the grievance was remanded to Step I at the urging of defendant Robert Grossman. Grossman was the grievance officer at the college and was involved at least to some extent in all decisions regarding plaintiffs' status and acted as liaison between the parties and Kneller. Plaintiffs allege that the move to remand to a Step I grievance was a scheme by faculty defendants and Grossman to reassure the non-reappointment of Jones and Rosenthal. But the alleged scheme apparently failed when on June 13, 1974, Kneller reappointed Jones and Rosenthal stating that "further academic evaluation is warranted" in both cases. However, on October 2, 1974, Jones and Rosenthal were for a second time denied reappointment by the committee.

In March 1974, Massie submitted written material to the committee with respect to his tenure application. Massie also advised Kent that a book-length manuscript had been submitted to seven scholars for review and that the committee should perhaps postpone consideration of his tenure pending their responses. He supplied Kent with a list of the scholars and the committee decided to postpone voting on Massie's tenure.

Thereafter, Massie discovered a letter from Kent to Professor Van Heijenoort of Brandeis University, dated April 1, 1974, which solicited criticism of Massie's manuscript. Massie protested on the ground that Van Heijenoort was personally hostile to him. Kent reassured him that Van Heijenoort's review would not be considered if negative. On May 9, 1974, the Committee voted to deny Massie tenure.

In the spring of 1974, Sprague and Brown met with Kneller to discuss, *inter alia*, Kent's qualifications to serve as interim chairman, and on June 10 they submitted a

memorandum setting forth reasons why he should not be permitted to continue. In June 1974, Kneller removed Kent and named Cannavo as acting chairman.

On October 1, 1974, Cannavo asked plaintiff Fred Korn if he wanted to be considered for a certificate of continuous employment, somewhat akin to tenure, or for associate professorship. Korn requested the former, but on October 2, 1974, the committee voted not to recommend Korn for a certificate.

The plaintiffs also allege that of considerable importance in their failure to gain reappointment and tenure was the negative evaluations of their classroom technique submitted against them by faculty members. All of the evaluators were chosen by Kent and Cannavo, as interim and acting chairman respectively, and all were faculty members named as defendants.

In December 1974, each plaintiff initiated a union grievance. The college review committee set up by Kneller for the *de novo* hearings was chaired by defendant Donald R. Reich, who by this time had replaced Van Solkema as vice-president and provost of the college. The review committee upheld the committee's decisions to deny plaintiff's reappointment and at a Step I hearing in March 1975, that decision was affirmed by Kneller. Plaintiff's last day of work pursuant to their contracts was August 31, 1975.

FIRST AMENDMENT CLAIMS

In *Pickering v. Board of Education*, 391 U. S. 563 (1968), a teacher was discharged for writing a letter to a local newspaper criticizing the school board's handling of certain bond issue proposals and its allocation of financial resources between educational and athletic programs. The Court held that in determining whether a government employee's speech is constitutionally protected, "the interests of the [employee], as a citizen, in commenting upon

matters of public concern" must be balanced against "the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568.

In a later case, the Court projected that view even further, holding that a public employee is not entitled to reinstatement even when constitutionally protected conduct plays a "substantial" part in a decision to terminate the employee, where the employer can show that termination would have occurred even in the absence of the protected conduct. *Mt. Healthy City Board of Education v. Doyle*, 429 U. S. 274, 287 (1977).

Viewing the allegations of this complaint liberally as we must, it is manifest that the claims of constitutional violation asserted are insufficient on their face. Plaintiffs do not claim they were denied reappointment for speaking publicly or privately in criticism of college policies. What is so apparent on the face of the complaint is an attempt to draw the court into a stale dispute admittedly between "two factions in the department [who] did have a constant disagreement as to the most appropriate method of teaching certain classes and certain students." Plaintiffs' Memorandum of Law at 19. The conceded "conflict and dissension between two factions in the department"—again to quote plaintiffs, *id.* at 13—plainly amounts to nothing more than "bickering" among academic colleagues and hence cannot give rise to a violation of First Amendment rights. See *Pickering v. Board of Education*, *supra*; *Chitwood v. Feaster*, 468 F. 2d 359 (4 Cir. 1972).[1]

---

[1]We have considered in this connection the latest Supreme Court decision, *Givhan v. Western Line Consolidated School Dist.*, 99 S.Ct. 693 (1979), which plaintiffs recently called to the court's attention. That case, however, dealt with a teacher's private encounters with a school principal in which she voiced criticism of employment policies and practices which she considered racially discriminatory. That situation is essentially different from the interfactional controversy involved here.

If it were otherwise, the door would be opened for countless appeals to federal judges to act as mediators in academic disputes—a task this court considers itself particularly unadapted to perform.

The Court of Appeals for this Circuit sitting *en banc* has recognized that not every claim asserted by a teacher requires an evidentiary hearing to determine the merits. In *East Hartford Ed. Ass'n v. Bd. of Ed. Etc.*, 562 F. 2d 838, 856 (2 Cir. 1977) (*en banc*), the court declined to accord First Amendment protection to a teacher's symbolic "speech," *i.e.*, his desire to wear a necktie. It stated:

> "This final claim [that dress of this type enhances his ability to teach] does not implicate the First Amendment. It is merely an assertion that one teaching technique is to be preferred over another. It has no more to do with a constitutional interest than would a claim that closer 'rapport' could be achieved by arranging students' desks in a circle rather than in rows." *Id.* at 857 n. 5.

Although *East Hartford Ed. Ass'n* involved high school education, it clearly cautions against federal court intervention except when First Amendment rights are truly in jeopardy as a result of offical actions. Because teaching is by definition an expressive activity, every dispute over the best method of classroom instruction would raise First Amendment issues calling for federal court intervention. See *East Hartford Ed. Ass'n v. Bd. of Ed., supra*, 562 F. 2d at 859.

Since plaintiffs have failed to allege anything more than an academic dispute with professional colleagues, their claims for relief under §1983 and the First Amendment must be dismissed.

FOURTEENTH AMENDMENT DUE PROCESS CLAIMS

Plaintiffs' right to maintain any due process claims depends, of course, upon whether their interest in continued employment rises to the level of "property" or "liberty" protected by the Fourteenth Amendment. *Simard v. Board of Education of Town of Groton*, 473 F. 2d 988, 992 (2 Cir. 1973). In *Board of Regents v. Roth*, 408 U. S. 564 (1972), and *Perry v. Sindermann*, 408 U. S. 593 (1972), the Court considered the interest of non-tenured teachers like plaintiffs. It concluded that to demonstrate a deprivation of liberty, a plaintiff must show that the reasons given for denial of tenure would damage his standing in the community or foreclose him from taking advantage of other employment opportunities. A property interest would be properly asserted only if plaintiff demonstrates more than a unilateral expectation of continued employment; he must show some legitimate claim of entitlement to it by pointing to concrete State rules or regulations or a well-established joint understanding amounting to a *de facto* tenure program. See *Simard v. Board of Education of Town of Groton*, *supra*, 473 F. 2d at 992.

Plaintiffs do not, and apparently cannot, allege that they have a property interest in re-employment and tenure under *Roth*. Nor do they allege that any *de facto* tenure program existed upon which they can claim a property interest in their continued employment under *Perry*. Plaintiffs, moreover, have apparently conceded that they have been deprived of no liberty interest. The complaint fails to allege that anything defendants have done has seriously damaged plaintiffs' standing in the community or has imposed a stigma or other disability on them that has foreclosed their ability to take advantage of other employment opportunities. *Roth*, *supra*, 408 U. S. at 573. See *Wahba v. New York University*, 492 F. 2d 96 (2 Cir.), *cert.*

denied, 419 U. S. 874 (1974); *Simard v. Board of Education of Town of Groton, supra*; *Russell v. Hodges*, 470 F. 2d 212 (2 Cir. 1972).

In *Roth*, the Court made it clear that the stigma to which it referred must involve moral turpitude, for example that which attaches to a charge of dishonesty or immorality. 408 U. S. at 573. The fact that a discharge might make a person less attractive as an employee or have a deleterious effect upon his future employment opportunities does not give rise to a right to a pre-termination hearing. *Id.* at 474 n.13. And, more recently, the Court added yet another gloss to the *Roth* cases. It made it clear that the liberty interest recognized by *Roth* cannot be infringed upon without a showing that the public employer publicized the reasons for the termination. *Bishop v. Wood*, 426 U. S. 341 (1976). See also *Board of Curators v. Horowitz*, 435 U. S. 78, 83 (1978); *Codd v. Velger*, 429 U. S. 624 (1977); *Longarzo v. Anker*, 578 F. 2d 469 (2 Cir. 1978). Here, the allegations of the complaint simply do not state a claim of deprivation of liberty under *Roth*. See *LaBorde v. Franklin Parish School Board*, 510 F. 2d 590 (5 Cir. 1975) (decision not to renew teacher's contract because of dissatisfaction with teaching methods and classroom technique did not state a claim under *Roth*). *Accord Blair v. Board of Regents*, 496 F. 2d 322, 324 (6 Cir. 1974); *Russell v. Hodges, supra*; *Jablon v. Trustees of California State College*, 482 F. 2d 997 (9 Cir. 1973), *cert. denied*, 414 U. S. 1163 (1974).

Plaintiffs argue, notwithstanding, that they have a property interest in a fair hearing, which they claim arises out of a bargaining agreement between plaintiffs' union and the BHE. The agreement assertedly grants non-tenured teachers the right of review and confrontation in the evaluation of their job status. Plaintiffs' Brief in Opposition at 26-27.

We do not believe that any constitutional right to due process recognized under the *Roth* and *Perry* line of cases

supports plaintiffs' claim. These cases involved a public employee's right to a pre-termination hearing if a decision to terminate would deprive him of a property or liberty interest within the meaning of the cases. Here, plaintiffs have not alleged a deprivation of either property or liberty sufficient to withstand a motion to dismiss. Accordingly, it would be somewhat anomalous to conclude that a contractual right to review and confrontation actually afforded plaintiffs did not accord with established concepts of due process. In the court's view, this would open to constitutional litigation a number of claims foreclosed by the decisions in *Roth* and *Perry*. See *Eichman v. Ind. State Univ. Bd. of Trustees*, 597 F. 2d 1104, 1108 (7 Cir. 1979). *Cf. Longarzo v. Anker*, 578 F. 2d 469 (2 Cir. 1978). Since plaintiffs have pointed to no property or liberty right protected by the Fourteen Amendment, their claims of violations of substantive and procedural due process are also dismissed. See *Webster v. Redmond*, 599 F. 2d 793 (7 Cir. 1979); *Eichman v. Ind. State Univ. Bd. of Trustees, supra*, 597 F. 2d at 1108.

CONSPIRACY UNDER 42 U. S. C. §1985 (3)

The deficiency of plaintiffs' §1985 (3) pleading is readily apparent. In *Griffin v. Breckenridge*, 403 U. S. 338 (1971), the Court concluded that

> "[t]he language requiring intent to deprive equal protection, or equal privileges and immunities, means that there must be some racial or perhaps otherwise class-based, invidiously discriminating animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." 403 U. S. at 102.

The language has been interpreted to require discrimination between classes based on racial bias, national origin or religion, *Perrotta v. Irizarry*, 430 F. Supp. 1274, 1278 (S.D.N.Y.), *aff'd*, 573 F. 2d 1294 (2 Cir. 1977), *citing Hahn v. Sargent*, 523 F. 2d 461 (1 Cir. 1975); *Arnold v. Tiffany*, 487 F. 2d 216 (9 Cir. 1973), *cert. denied*, 415 U. S. 984 (1974); *Western Telecasters, Inc. v. California Federation of Labor*, 415 F. Supp. 30 (S.D. Cal. 1976), and the class must be "well defined" and "a traditionally disadvantaged group." *Santiago v. City of Philadelphia*, 435 F. Supp. 136, 156 (E.D. Pa. 1977).

Although the complaint alleges a lengthy series of so-called overt conspiratorial acts, it fails entirely to set forth any allegation of class-based discriminatory animus. Whatever the scope of a §1985 (3) action, which is currently undergoing an evolutionary process, see *Great Am. Federal S. & L. Ass'n v. Novotny*, 99 S.Ct. 2345 (1979); *Regan v. Sullivan*, 557 F. 2d 300, 307-08 (2 Cir. 1977), the court is of opinion that the allegations of this complaint are insufficient, see *Ellentuck v. Klein*, 570 F. 2d 414 (2 Cir. 1978); *Kletschka v. Driver*, 411 F. 2d 436 (2 Cir. 1969); *Gordon v. Anker*, 444 F. Supp. 49 (S.C.N.Y. 1977); *Morpugo v. Bd. of Higher Ed. in City of New York*, 423 F. Supp. 704 (S.D.N.Y. 1976), notwithstanding plaintiffs' contention that a class of three members of a minority faction of a college department toward which "invidious animus" is directed satisfies the section's requirements. Plaintiffs' §1985 (3) claims are therefore dismissed.

MONELL CLAIMS

Finally, the complaint under docket number 78 C 1780 asserts liability on the part of the Board of Higher Education of the City of New York and its officials under the theory of *Monell v. Department of Social Services of the City of New York*, 436 U. S. 658 (1978). In *Monell*, the

Court concluded that a governmental entity could be held liable if "action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* at 691. Liability does not arise under §1983, however, on a *respondeat superior* theory. *Dominguez v. Beame*, slip op. 3409, 3417 (2 Cir., June 28, 1979). Thus,

> "a local government may not be sued under §1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983." 436 U. S. at 694.

And plaintiffs bear the burden of showing first that the governmental entry maintained or practiced an unconstitutional or unlawful "policy" or "custom," and second that the policy or custom "caused" or was the "moving" force behind the violation. *Dominguez v. Beame, supra*, slip op. at 3418. Finally, we assume for purposes of this discussion that *Monell* is applicable not only to plaintiffs' §1983 claims but also to their §1985 (3) allegation. See *Owens v. Haas*, slip op. 3647, 3654 (2 Cir., July 9, 1979); *Heimbach v. Village of Lyons*, slip op. 2387 (2 Cir., April 26, 1979).

Under the court's rulings, above, it is clear there can be no liability under *Monell's* rationale. Moreover, plaintiffs do not, and apparently cannot, allege that any of defendant's actions were undertaken in "execution of a government's policy or custom."

Accordingly, defendants' motion to dismiss the consolidated complaints is granted.

SO ORDERED.

The Clerk of Court is directed to enter judgment dismissing the complaints and is further directed to forward copies of this memorandum and order to counsel for the parties.

EDWARD R. NEAHER
U. S. D. J.

Dated: Brooklyn, New York
December 18, 1979

Judgment.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

JERE JONES, FRED KORN and DAVID MASSIE,

Plaintiffs,

against

JOHN W. KNELLER, individually and as President of Brooklyn College, *et al.*,

Defendants.

75 C 1898

78 C 1780

A memorandum and order of Honorable Edward R. Neaher, United States District Judge, having been filed on December 20, 1979, granting defendants' motion to dismiss the consolidated complaints, and directing the Clerk of the Court to enter judgment dismissing the complaints, it is

ORDERED AND ADJUDGED that the plaintiffs take nothing of the defendants; that the defendants' motion to dismiss the consolidated complaints is granted; and that judgment is hereby entered dismissing the complaints.

RICHARD H. WEARE
Clerk of Court

Dated: Brooklyn, New York
December 20, 1979

APPENDIX C.

Amended Complaint.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

JERE JONES, FRED KORN and DAVID MASSIE,

Plaintiffs,

against

JOHN W. KNELLER, individually and as President of Brooklyn College, SHERMAN VAN SOLKEMA, individually and as former Vice-President and Provost of Brooklyn College, ETHYLE R. WOLFE, individually and as Dean of the School of Humanities, Brooklyn College, SALVATOR CANNAVO, PAUL EDWARDS, GERTRUDE EZORSKY, EDWARD KENT, ARNOLD KOSLOW, ROBERT SCHWARTZ, PAUL TAYLOR, individually and as present and former voting members of the Appointments Committee of the Philosophy Department at Brooklyn College, DONALD R. REICH, individually and as Vice-President and Provost of Brooklyn College and ROBERT GROSSMAN, individually and as Grievance Officer and Special Assistant to the President of Brooklyn College for Legal Affairs,

Defendants.

Civil Action No. 75 Civ. 1898

Plaintiffs demand a Jury Trial

Plaintiffs, by their attorneys, Alpert & O'Rourke, as and for their amended complaint, respectfully allege:

JURISDICTION

1. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1343. This action arises under the First and Fourteenth Amendments of the Constitution of the United States of America and Title 42, United Dates Code, Sections 1983 and 1985(3).

PARTIES

2. Plaintiffs, Jere Jones ("Jones"), Fred Korn ("Korn") and David Massie ("Massie") are former members of the Philosophy Department at Brooklyn College.

3. Defendant, John W. Kneller ("Kneller") is President of Brooklyn College. Kneller has the prime responsibility for the proper administration of Brooklyn College in accordance with the By-Laws of the Board of Higher Education and in accordance with State Law. Kneller is sued in his individual and official capacities.

4. Defendant, Sherman Van Solkema ("Van Solkema") was the Vice-President and Provost at Brooklyn College during the period from Fall 1972 through Spring 1974. As such he was responsible for implementing the By-Laws and Resolutions of the Board of Higher Education and carrying out directives of the President and acting as Deputy for the President. Presently he is a Professor in the Department of Music. He is sued in his individual and official capacities.

5. Defendant, Ethyle R. Wolfe ("Wolfe") is the Dean of the School of Humanities at Brooklyn College. As such

she is responsible for the administration and coordination of policies and procedures as they concern the School of Humanities. The Philosophy Department ("Department") is part of the School of Humanities ("School"). She is sued in her individual and official capacities.

6. Defendants, Salvator Cannavo ("Cannavo"), Paul Edwards ("Edwards"), Gertrude Ezorsky ("Ezorsky"), Edward Kent ("Kent"), Arnold Koslow ("Koslow"), Robert Schwartz ("Schwartz") and Paul Taylor ("Taylor") are members of the Department at Brooklyn College and are present and former members of the Appointments Committee of the Department. Unless otherwise described herein, these seven defendants are designated as the "defendant-faculty". They are sued in their individual and official capacities.

7. Defendant, Donald R. Reich ("Reich") is Vice-President and Provost of Brooklyn College from September, 1974 to present. As such he was responsible for implementing the By-Laws and Resolutions of the Board of Higher Education and carrying out directives of the President and acting as Deputy for the President. Reich is sued in his individual and official capacities.

8. Defendant, Robert Grossman ("Grossman") was the Grievance Officer for Brooklyn College during the years 1972 to 1976. As such he was responsible for conducting hearings and making recommendations to the President on all Step I grievances. At Step II grievance hearings he represented the College. He is presently Special Assistant for Legal Affairs to President Kneller. He holds a Higher Education Officer line at Brooklyn College. He is sued in his individual and official capacities.

STATEMENT OF FACTS

9. Brooklyn College ("College") is one of ten tax-supported tuition-free "senior" institutions of higher education which form a part of the City University of New York ("CUNY"). CUNY is under the supervision of the Board of Higher Education pursuant to the Education Laws of the State of New York.

10. The plaintiffs joined the Faculty of the Department at the College in 1970 and 1971 and were reappointed each year until August 31, 1975, when the decision not to reappoint them for the year 1975-1976 became effective.

MISSION OF THE DEPARTMENT

11. The central mission of the College is to provide undergraduate education leading to the bachelor's degree. Thus the chief mission of the Department is to provide a range for the curriculum of a liberal arts college. The Department's minuscule M.A. program, and its members' occasional participation in the Philosophy PH.D. program at the Graduate Center are no more than ancillary to the Department's responsibility for undergraduate teaching. The plaintiffs were of the conviction that undergraduate teaching had first claim on their time and energies.

12. The plaintiffs found that teaching at the College was affected by continuously increasing class size and by increasing diversity in the academic background and preparation of the students. The "open enrollment" policy brought to the College students of diverse cultural backgrounds, with differing expectations about the nature and meaning of a college education. As class size and student diversity increased, cumbersome bureaucratic procedures evolved to deal with the resulting administrative

and academic problems. This educational environment alienated both students and faculty and seriously impaired the educational process. Plaintiffs found that to meet their teaching responsibilities effectively, they had to re-think and to re-evaluate traditional pedagogical methods.

LECTURE METHOD VERSUS JOURNAL METHOD

13. Large classes are most easily taught by the lecture method, where evaluation of students is by occasional examinations and term papers. However, the lecture-examination method of instruction presupposes that students have similar academic preparation and expectations. Since such similarity does not exist at the College, the lecture method does, however, enable the instructor to evade the pedagogical problems of student diversity and overcrowded classes, and frees him to pursue scholarly activities upon which promotion and tenure in the CUNY system largely depend. In this way, the educational interests of the students are sacrificed to the career ambitions of the faculty.

14. The plaintiffs found the lecture method unsatisfactory for the conditions existing at the College and introduced another method of teaching philosophy. It is a method of individualized instruction that is responsive to the needs of the students, but one that makes great demands on the instructor's time and availabililty. In this method each student works on a series of assignments of increasing difficulty. The student works in a bound composition book (called a "Journal") that is collected and read by the instructor a number of times throughout the semester. A one-to-one relationship between student and teacher is thereby created. The instructor is able to monitor the student's progress, give detailed criticism, and to make suggestions designed to help the student in his ongoing philosophical thinking. In this way each student in a

class receives individualized instruction; each is able to work at his own pace, and assignments can be tailored to the student's particular needs. This journal method has proven to be an effective way to overcome the problems of large classes and diversity in academic preparation.

15. The journal method, however, makes great demands on the instructor. He must collect and grade the journals frequently, typically at least five or six times a semester, and the student is also free to hand in his journal for comment at any time. Journals must be read and returned as quickly as possible so that the student's momentum in the learning process is maintained. Because each journal must be read carefully and given individual criticism, the use of this method with large classes entails many hours of work each week outside of class, in addition to the time normally given to class preparation. Moreover, the nature of the journal assignments is such that it is necessary to confer with students about their journal work, often at great length. Thus, the instructor must make himself available to his students for much mere time than the officially required office hours. (College regulations require that each full-time member of the faculty hold three office hours per week; the journal method requires that about four times this number of hours be made available to students for individualized consultation outside the classroom). Thus the journal method of instruction involves both the student and teacher in the learning process in a way never approached by the lecture method.

PLAINTIFFS' COMMITMENT TO COLLEGE LIFE

16. Beyond the use of the journal method, the plaintiffs have tried to participate in, and help create, the intellectual life of the College. The three plaintiffs have (without remuneration) taught tutorials (for college credit) and

unofficial courses to interested students. Further, because they spent their time on campus, they were able to participate in various academic activities of the Department and of the College, such as attending seminars to hear papers by scholars from other universities and by members of the College faculty, and attending meetings of the Philosophy Club to hear student discussions and papers presented by the students in the Department.

DEFENDANT-FACULTY'S INDIFFERENCE TO COLLEGE LIFE

17. In sharp contrast, except for their teaching duties and administrative functions, the defendant-faculty have been distinguished by their absence from the campus. Moreover, some of them have sought, and in some cases obtained, teaching schedules that keep their time on the campus to an absolute minimum to facilitate their interests and activities outside the College. The assurance of such preferential treatment in scheduling and class assignments for the defendant-faculty became a source of conflict with the Department. The defendant-faculty have also been grossly remiss in their obligations to attend philosophy papers at the College given both by their colleagues and outside scholars, and to attend student philosophy papers and seminars sponsored by the students' Philosophy Club. Moreover, the defendant-faculty have continued to use the lecture method of instruction in their classes, and have apparently made no attempt in their teaching to deal with their overcrowded classes and the increasing diversity in the academic preparation and ethnic background of their students.

SPRAGUE AND THE JOURNAL METHOD

18. The plaintiffs were not alone in their desire to teach

philosophy by the journal method. One of their colleagues, Elmer Sprague ("Sprague") had in 1970 been reexamining his teaching of philosophy and came to the conclusion that the journal method could provide students of philosophy with plenty of opportunity to do philosophy by participating in a written dialogue with the teacher.

19. For Sprague, the journal method had another virtue. It afforded at least one educational experience in which the student is taken seriously as an individual. For the space of a term, the student has a teacher continuously interested in the student's intellectual progress. And in an institution as alienating as the College, Sprague welcomed the student's surprise and joy at being taken seriously.

20. Apart from Sprague, those who regarded undergraduate teaching as their primary commitment to the College were non-tenured, junior faculty; those who were not greatly concerned with undergraduate teaching were, for the most part, tenured, senior faculty. Sprague's long-held conviction that undergraduate teaching was the primary duty of the faculty, his support of the journal method, and his view that the faculty should participate fully in the educational life of the College, presented a serious threat to the senior faculty's interest in keeping their time on campus at a minimum.

THE DEFENDANT-FACULTY BAND TOGETHER

21. As events unfolded, the defendant-faculty saw fit to band together to protect their interests. In the late Spring of 1972, when it was learned that Martin Lean, Chairman of the Department, was going to spend a year at the University of Southern California, a petition was drafted and forwarded to Kneller requesting an election to fill the Acting Chairman position. A petition for such purpose was unprecedented in the history of the Department at the

College. Sprague was Vice-Chairman of the Department at that time and would by tradition have become Acting Chairman. The petition was signed by seven members of faculty rank of the Department (including six of the defendant-faculty). The petition was not shown to the plaintiffs, Malcolm Brown or Abigail Rosenthal, all of whom except for plaintiff Korn had faculty rank and were eligible to sign the petition.

22. Kneller denied the request stating that Lean had not vacated his post and that the standard procedure was for the President to designate the Acting Chairman in the form of a recommendation to the Board of Higher Education ("BHE"). Kneller agreed to receive the results of any informal election before making his recommendation.

SPRAGUE DEFEATS KENT

23. On May 8, 1972, the Department conducted its informal election. The result was Sprague 7, Kent 6. Sprague was thus declared the Department's choice for Kneller's recommendation to the BHE for Acting Chairman of the Department for the Academic year 1972-73.

SPRAGUE BECOMES ANATHEMA TO DEFENDANT-FACULTY

24. During the Academic year 1972-73, with Sprague as Acting Chairman of the Department, the defendant-faculty concluded that Sprague was unacceptable to them in such a position of authority. As Acting Chairman of the Department, Sprague was a member of the College-Wide Personnel and Budget Committee presided over by Kneller. It was the responsibility of this committee to vote on the final recommendations for promotion in the College. At the Committee's annual meeting to decide on promotions in the Fall of 1972, Sprague, when questioned by

Kneller, reported that Kent had been voted reappointment for 1973-74 by a vote of only 3-2 in the Department's Appointments Committee. Kent thereupon failed to receive enough votes in the College-Wide Personnel and Budget Committee to be promoted to Associate Professor. Further, under questioning by Dean of Faculties, Sprague also reported to this Committee that Cannavo did not have a contract to publish his manuscript and that his bibliography otherwise consisted of one jointly-authored article. Cannavo thereupon failed to gain enough votes in the Committee to be promoted to Full Professor. Each filed but lost grievances on their failure to be promoted. Both Kent and Cannavo blamed Sprague for their failure to gain promotions.

25. Kent and Cannavo were not the only defendant-faculty who were opposed to Sprague. Both Koslow and Ezorsky opposed Sprague and for the same reason, *viz,* Sprague was a member of a college-wide committee on promotion in 1971 which refused to recommend Koslow or Ezorsky for promotion to Full Professor on the grounds that neither had published a book, which was one of the assumed and applied criteria for such promotion.

26. Edward was also opposed to Sprague because, while Sprague was Acting Chairman, he instisted on enforcing the multiple position regulations with regard to Edward's teaching at the New School which was in conflict with his College duties, and because Sprague insisted that both senior and junior faculty should take their proper share of the undergraduate teaching load and Department duties such as committee work and making teaching observations.

DEFENDANT-FACULTY RESOLVES TO CONTAIN SPRAGUE

27. By the Fall of 1972, the defendant-faculty knew that they must take strong action against Sprague if they were going to continue their privileged ways at the College. Since Sprague was a tenured Full Professor and had the support of the majority of the Junior Faculty, it became necessary to isolate him and to nullify his influence in the Department. This could be accomplished by denying Sprague, or any member not aligned with the Defendant-faculty, the Chairmanship of the Department or membership on its Appointments Committee.

28. The week preceding the triennial election Sprague published a list of the faculty eligible to vote for Chairman in the upcoming election. The list included the name of Michael Smithurst because the Dean of Faculties had informed Sprague that Smithhurst's line entitled him to vote. Koslow objected and went to the Dean of Faculties who then reversed his decision.

29. With the triennial election for Department Chairman and Appointments Committee coming up in May, 1973, the defendant-faculty put into motion their plan to isolate Sprague. They lined up their candidate for chairman—Kent—and seven agreed to vote for him, giving him a majority (since there were only twelve voting members of faculty rank). They next set about to line up the Appointments Committee to which four members would be elected, the Chairman sitting as the fifth member. The membership of the Appointments Committee was to include only those associated with Kent, though this violated the long-standing practice in the Department that there be representation of both majority and minority factions on the Appointments Committee.

THE CABAL TAKES CONTROL

30. As expected, Kent was elected Chairman by a vote of 7-5. Cannavo, Ezorsky, Koslow and Taylor were elected members of the Appointments Committee. Ezorsky then moved and Cannavo seconded that the Department should at that time elect a replacement for her on the Appointments Committee for the Academic year 73-74 since she had requested, and Kneller was recommending, special leave for her for that year. The vote was 7-4 in favor of the motion, Sprague abstaining.

31. Edwards then moved and Ezorsky seconded that the list of those eligible for election to the Appointments Committee be enlarged to include Emily Michael and Robert Schwartz who were to join the Department in the Fall of 1973. Sprague ruled the motion out of order, stating that neither was eligible for election, pursuant to the By-Laws of the BHE. Koslow appealed the chair's ruling; Taylor seconded the appeal. The vote on the appeal was 7-4, the appeal being successful. Michael and Schwartz were then added to the list of those eligible and Schwartz was elected as Ezorsky's replacement by a vote of 7-4 with one abstention.

32. Sprague reported the results of the election to Kneller and questioned whether Schwartz could properly be elected as replacement for Ezorsky and whether Kent should properly be confirmed as Chairman. Kneller then assigned Van Solkema to investigate the circumstances existing in the Department and to recommend a course of action.

PLAINTIFFS COMPLAINT TO THE ADMINISTRATION

33. In May, 1973, Van Solkema interviewed the faculty to get their views on Kent's becoming Chairman. In asking

them to speak freely, Van Solkema promised each of the nontenured faculty who had voted against Kent that there would be no reprisals for their candid judgments expressed to him, and that their reappointment and tenure applications would be decided by an outside board of review. They told Van Solkema that in their view Kent was professionally, morally and emotionally unfit to be Chairman and that the Department should be placed in receivership.

THE ADMINISTRATION RESPONDS FAVORABLY

34. Van Solkema reported to Kneller the results of his investigation and on May 31, 1973, Kneller met with the Department. He made three announcements: 1) Kent would not be confirmed as Chairman; he would, however, be designated "Interim Chairman" until a permanent chairman could be selected; 2) he was instituting a search committee for a permanent chairman; and 3) Schwartz could not properly be a candidate to serve as Ezorsky's replacement on the Appointments Committee because he was not yet a member of the faculty.

35. That same day Sprague called for nominations at the meeting of the Department to elect a replacement for Ezorsky. At that time a motion was made and seconded to postpone the election of a replacement for Ezorsky until the Fall. The motion carried by a vote of 7-5.

36. In September, 1973, the Department met to elect a replacement member for Ezorsky on the Appointments Committee. Schwartz and Brown each received 7 votes (Schwartz having joined the faculty as of September 1, 1973). A compromise was offered and accepted. Each would serve a semester on the Appointments Committee, Brown in the Fall and Schwartz in the Spring.

37. At this meeting the Department voted for two members to serve on the five-member Search Committee

instituted by Kneller to recruit a permanent Chairman for the Department. Cannavo and Edwards both received 8 votes; Brown and Rosenthal received 6 votes. Sprague then met with Van Solkema and requested him to urge Wolfe to appoint Brown and Rosenthal in order to have both the majority and minority factions of the Department represented on the Search Committee. Van Solkema refused to do so.

THE CABAL SETS INTO MOTION ITS PLAN TO RETALIATE

38. During the week preceding the meeting of the new Appointments Committee on October 3, 1973, Massie, Jones and Brown were called in separately to Kent's office. Massie and Jones were warned that *four* of the junior faculty lines were endangered for sudden budgetary reasons. Brown was warned that *some* lines were endangered. But the talk of losing four lines was dropped when, shortly before the October 3, 1973 Departmental meeting Sprague challenged Kent's assertion of a "budget crisis" and called Wolfe to check. The "crisis" was officially ended with Kent's announcement at the Department meeting of October 3, 1973 that Wolfe had informed him that there was no budgetary crisis.

39. On the afternoon of Wednesday, October 3, after the Appointments Committee had held its first session (at which no action was taken on reappointments) the request was first made to Brown, Massie and Jones to submit written material. There was a notable lack of effort on the part of Kent, who was making the requests for written materials, to assure that the materials got to the Committee in time to be read. Massie was not told until Thursday, October 4 that written work had to be submitted. Only Jones, Brown and Massie were asked to submit publications, manuscripts and work-in-progress. Rosenthal had already submitted publications and work-in-progress to

replace the material which had been submitted with her Spring, 1973 promotion application, but she was specifically told by both Kent and Taylor *not* to submit the five chapters of a book on evil, which she had written since the Spring.

40. On October 5, 1973, the Appointments Committee voted to reappoint Brown, Kent, Korn, Massie, Wiseman and Caffentzis and voted not to reappoint Jones, Rosenthal and Smithurst.

41. In the Spring of 1973, Robert Grossman was the Grievance Officer at Brooklyn College. From the time of the May 9, 1973 Triennial election for Chairman and Appointments Committee members until the plaintiffs' employment at Brooklyn College was terminated, Grossman was involved to a greater or lesser extent in most, if not all, decisions and actions that directly or indirectly affected the professional status of the plaintiffs during their tenure at Brooklyn College.

42. Further, after the plaintiffs had left the College in the Fall of 1975, seeking employment elsewhere, Grossman continued to be involved in decisions and actions affecting the reputation and professional status of the plaintiffs by assuming a position of responsibility in the College's efforts to persuade the American Philosophical Association to remove a finding of censorship against the Department of Philosophy.

43. Grossman's position at the College was such that he was the intermediary between the plaintiffs and defendants to the President who relied on his good faith in presenting the respective positions of the parties.

GRIEVANCES AND *DE NOVO* HEARING

44. Jones and Rosenthal then instituted grievances

charging political reprisal. The Union requested a *"De Novo"* hearing on the issue of whether or not Jones and Rosenthal were "with merit".

45. Kneller granted the request and designated the College Review Committee, under the chairmanship of Van Solkema, to review the records. Van Solkema appointed a Subcommittee of three to investigate and report. As Chairman of the Subcommittee Van Solkema selected Hildegarde Wichert Five ("Five"), a close friend and ally of Cannavo.

46. The Subcommittee conducted its investigation and reported to the full Committee. The full Committee allowed Sprague to speak only for ten minutes on behalf of Jones and Rosenthal, while Kent was allowed to speak for twenty minutes against Jones and Rosenthal. Edward Lutz, the Union's representative requested time to address the full Committee but his request was denied by Van Solkema.

47. In December, 1973, the College Review Committee upheld the action of the Department's Appointments Committee not to reappoint Jones and Rosenthal. In January, 1974, Kneller denied the Step I grievance.

48. In January, 1974, Jones and Rosenthal initiated a Step II grievance. The Union and the Administration agreed to remand the Step II hearing to a Step I hearing without prejudice to either side.

KENT REMOVED AS INTERIM CHAIRMAN

49. In late Spring, 1974, Sprague and Brown met with Kneller to discuss the Jones and Rosenthal cases and to discuss reasons why Kent ought not continue to serve as Interim Chairman. Kneller requested Sprague and Brown to set forth in writing the considerations that weighed

against Kent continuing as Interim Chairman. On June 10, 1974, such a memorandum was delivered to Kneller.

50. On June 13, 1974, Kneller reappointed Jones and Rosenthal, stating in his Step I Grievance Decision that it is "the decision of the President that further academic evaluation is warranted" in both cases.

51. Shortly thereafter, Kneller removed Kent as Interim Chairman and named Cannavo Acting Chairman.

52. Earlier, in February 1974, Kent contacted Korn and asked him to decide whether he wished to be considered for a Certificate of Continuous Employment ("CCE") as a certified lecturer or whether he wished to wait until the following Academic year and try for appointment as an Assistant Professor. Korn told Kent, that given the choice, he would choose the Assistant Professor category and, therefore, that Kent should not consider Korn for the CCE.

53. In March, 1974, Kent contacted Massie regarding Massie's tenure consideration by the Appointments Committee and requested all of his written material. Massie submitted manuscripts to Kent and advised Kent that a book-length manuscript had been submitted to seven scholars for review and that perhaps the Appointments Committee might want to postpone consideration of his tenure pending replies from those scholars. Kent requested, and Massie supplied, a list of the scholars to whom the manuscript had been sent. The Appointments Committee postponed voting on Massie.

54. On March 19, 1974, Massie wrote Van Solkema objecting to the manner in which he was being considered for tenure. Massie also sent copies of this letter to Kneller and Wolfe.

55. On April 1, 1974, Massie discovered a letter from Kent to Van Heijenoort of Brandeis University asking for criticism of Massie's manuscript. Massie protested to Kent that Van Heijenoort was personally hostile to Massie. Nonetheless, Kent sent the letter and the book-length manuscript to Van Heijenoort.

56. Shortly thereafter, Kent wrote Massie promising that Van Heijenoort's review would not be counted if it were negative.

57. On May 9, 1974, the Appointments Committee voted to deny tenure to Massie.

58. In the Spring of 1974, Vice-President and Provost Sherman Van Solkema resigned his position and returned to the Department of Music as full Professor. During this same Spring the College retained the services of Donald R. Reich as Vice-President and Provost and as full Professor in the Department of Political Science. He reported for duty in September, 1974.

59. Reich, upon assuming the office of Vice-President and Provost in September of 1974, refused to intervene in the controversy between the plaintiffs and the defendant-faculty in violation of his duties and obligations. In November, 1974, Reich involved himself in the affairs of the Department of Philosophy by authorizing funds for evaluations of Massie's and Rosenthal's manuscripts. Further, in his official capacity as Chairman of the College Review Committee, he chaired the College review Committee when it acted upon the tenure candidacy of Massie and the Certificate of Continuous Employment candidacy of Korn.

60. In late September and early October, 1974, Cannavo, as the new Acting Chairman, conducted the contractual procedures of evaluation concerning the impending reappointment decision of Jones, Rosenthal and Korn with the same disregard for academic due process as had Kent during his tenure as Interim Chairman.

61. On October 1, 1974, Cannavo called Korn, asking him to choose between being considered for CCE or Assistant Professor. On October 2, 1974, Korn delivered a letter to Cannavo requesting consideration for CCE if it could be done without jeopardizing his chances for appointment as Assistant Professor. On October 2, 1974, Korn was not recommended for the CCE by the Appointments Committee.

62. On October 2, 1974, the Appointments Committee voted to deny reappointment to Jones and Rosenthal.

63. On November 27, 1974, Kneller notified Jones and Rosenthal of his decision not to reappoint them and also notified Massie and Korn of his decision to deny them tenure and a CCE, respectively.

64. In December, 1974, each of the plaintiffs initiated a Union grievance. The Step I hearings took place in March, 1975 and the decision denying their grievances was handed down in May, 1975. Their last day of work pursuant to their contracts was August 31, 1975.

65. In the Spring and Fall of 1975, Reich involved himself in decisions and actions affecting the representation and professional status of the plaintiffs by assuming responsibility for the College's efforts to persuade the American Philosophical Association to remove a state censureship against the Department of Philosophy.

COUNT ONE

The previous paragraphs of this amended complaint are hereby incorporated by reference into Count One as if they were fully set forth.

For on or about April, 1972, up to and including August 31, 1975, the defendants willfully, purposefully and in pursuance of a conspiracy denied and deprived the plaintiffs of rights guaranteed to them by the Constitution and laws of the United States in violation of Title 42, United States Code, Section 1983.

It was part of said conspiracy that the defendant-faculty would and did endeavor by means of misrepresentation, intimidation and coercion to force the plaintiffs to vote for Kent for Chairman of the Department in the triennial election in May, 1973, and that the defendant-faculty would and did take control of the Chairmanship and the other four seats in the Appointments Committee of the Department.

Once in control of the Chairmanship and the Appointments Committee, the defendant-faculty agreed, in furtherance of the conspiracy, that they would, and subsequently they did set into motion a plan to bring about the removal of the plaintiffs from the College for: a) opposing Kent as Chairman; b) making appeals to Kneller not to confirm Kent as Chairman; c) challenging the legality of Schwartz' election to the Appointments Committee; and, most importantly, d) asking that the Department be placed in receivership, which would have nullified all actions taken at the May, 1973 election.

It was further a part of said conspiracy that, at Kneller's direction, Van Solkema would and did meet with Jones and Massie in May, 1973, and get them to speak frankly about the state of the Department and the unsuitability of Kent as Chairman. Van Solkema would and did promise Jones and Massie that they would be protected from

political reprisal, that outside committees would be arranged to review their reappointment and tenure candidacies and that he would remain personally accessible.

Reich and Grossman were members of the aforementioned conspiracy that would and did insure that Jones was not reappointed, that Massie was denied tenure and that Korn was not appointed as a lecturer with a Certificate of Continuous Employment.

It was part of said conspiracy that the defendants would and did insure that Jones was not reappointed, that Massie was denied tenure and that Korn was not appointed as a lecturer with a CCE.

In furtherance of said conspiracy, Wolfe, Van Sokema, Reich and Kneller would and did refuse to exercise their authority to prevent the defendant-faculty from carrying out their unlawful plan to remove the plaintiffs from the College even after they had necessary and sufficient knowledge of the dishonest tactics being used by the defendant-faculty.

In furtherance of said conspiracy, the defendants would and did prejudice the committees outside the Department that reviewed their actions, including the School of Humanities Personnel and Budget Committee and the College Review Committee.

OVERT ACTS

Among the means by which the defendants would and did carry out the aforesaid conspiracy were the following:

1. In April, 1972, the defendant-faculty produced and signed a petition to Kneller requesting a departmental election for Acting Chairman.

2. In early 1973, the defendant-faculty would and did cause Cannavo to solicit a letter from outside the College

recommending Robert Schwartz, a candidate for a position in the Department, and discrediting the other candidate for the position sought by Schwartz. Cannavo would and did solicit such a letter in violation of the confidentiality rules pertaining to the Appointments Committee.

3. In May, 1973, the defendant-faculty would and did attempt illegally to have Schwartz replace Ezorsky on the Appointments Committee before Schwartz was even a member of the faculty.

4. On May 31, 1973, after Kneller ruled that Schwartz could not legally be elected to replace Ezorsky, the defendant faculty would and did cause a postponement until Fall of 1973 of the vote for a replacement for Ezorsky.

5. Kent would and did falsely represent in October, 1973, that there was a budget crisis affecting four junior lines in the Department.

6. Kent would and did cause Cannavo to be the observer of Jones' teaching and Cannavo would and did report unfavorably. Cannavo would and did withhold his report from Jones until October 3, 1973. On that date Jones meets with Kent and Cannavo and is shown the teaching observation report five minutes before the Appointments Committee is scheduled to consider his reappointment. At this meeting Kent conducts annual evaluation conference simultaneously with post-observation teaching conference.

7. Kent would and did cause Taylor to be the observer of Rosenthal's teaching and Taylor would and did report unfavorably. Taylor's report and Koslow's report on his Spring, 1973 observation of Rosenthal's teaching would be and are withheld from Rosenthal until October 3, 1973,

when she is scheduled to meet with Kent for her annual evaluation conference.

8. In October, 1973, Kent would and did assign himself to be the observer of Korn's teaching and Kent would and did report unfavorably.

9. Jones and Rosenthal object to their unfavorable teaching observation reports and demand reasonable time to prepare rebuttals. The October 3, 1973 meeting to consider reappointments is postponed to October 5, 1973. On October 3, 1973, after the postponement Kent would and did request that Jones, Brown and Massie submit manuscripts and work-in-progress at 1 P.M. October 5, 1973, while both Kent and Taylor would and did advise Rosenthal not to submit such materials.

10. On October 4, 1973, Cannavo would and did contact Jones and offers to change observation report or do it over. After Jones declines and restates his intention to rebut the report, Cannavo would and did cause the original observation to be changed in such a way as to delete the obviously prejudicial remarks.

11. Of the seven candidates for reappointment, Kent would and did invite only Jones and Rosenthal to confront Appointments Committee at its meeting on Friday, October 5, 1973.

12. At Appointments Committee meeting of October 5, 1973, Koslow would and did raise the question of whether Rosenthal knew German. Kent would and did then leave the meeting to discuss the issue with Rosenthal and upon returning to the meeting, Kent would and did falsely represent to the Appointments Committee that Rosenthal did not know German.

13. In October, 1973, Kent would and did falsely represent to the Appointments Committee that Michael Smithurst had resigned and was going back to England and that, therefore, they should not consider him for reappointment.

14. On October 5, 1973, Appointments Committee would and did vote to reappoint Brown, Massie, Kent, Korn, Wiseman and Caffentzis and would and did vote not to reappoint Jones, Rosenthal and Smithurst.

15. After Jones learns of Appointments Committee's vote, Van Solkema would and did refuse to see Jones thus breaking his promise of accessibility, would and did refuse to see Sprague who wants to discuss the non-reappointments and would and did tell Lean that he does not want to hear about the Philosophy Department.

16. In November, 1973, Kneller would and did choose Van Solkema to chair College Review Committee ("CRC"), which would act as a De Novo committee considering whether Jones and Rosenthal are "with merit", even though Van Solkema had expressed prior negative judgments about Jones and Rosenthal.

17. Van Solkema would and did appoint Fife, a close friend and ally of Cannavo, to chair the three-man subcommittee which would investigate and report to the full De Novo Committee on the merits of Jones and Rosenthal.

18. In November, 1973, Kent would and did take Fife through the Jones and Rosenthal personnel files and would and did make false representations regarding the contents of these files.

19. In November, 1973, Kent would and did make false

representations to Frey-Wouters (another member of the three-man subcommittee) regarding Rosenthal's knowledge of German.

20. As Chairman of the De Novo Committee, Van Solkema would and did write a strong chairman's report recommending in December, 1973, that Kneller uphold the actions of the Appointments Committee recomending the nonreappointment of Jones and Rosenthal.

21. On January 17, 1974, Kneller would and did recommend to the Board of Higher Education the nonreappointment of Jones and Rosenthal.

22. In the Spring of 1974, Kent would and did request Korn to decide whether he wanted to be considered for a CCE or Assistant Professor without advising Korn that if he chose not to be considered for a CCE in the Spring Semester, he could not do so in the Fall. In doing so Kent would and did refuse to advise Korn that it was possible for him to apply for both the position of lecturer with CCE and Assistant Professor.

23. In March, 1974, the Appointment Committee would and did vote not to recommend Korn for a CCE even though Korn informed Kent that he did not want to be so considered.

24. In the Fall of 1974, Cannavo would and did request Korn to decide whether he wanted to be considered for a CCE or Assistant Professor knowing that Korn could not be considered for a CCE in the Fall.

25. In March, 1974, Kent would and did select Taylor as observer of Massie's teaching and Taylro would and did report unfavorably.

26. On March 6, 1974, Kent would and did falsely state to Massie that Taylor's retraction of his negative teaching evaluation of Massie would be appended to Taylor's original evaluation.

27. On March 1, 1974, Kent would and did inform Massie that written materials must be submitted by March 10th, superseding the previous deadline of March 16th. On March 4, 1974, Kent would and did further inform Massie that written materials must be submitted by March 6th because the Appointments Committee had to meet on March 7th because of a "conflict in schedules."

28. On March 7, 1974, the Appointments Committee would and did postpone consideration of Massie's tenure application after learning that Massie had sent a book-length manuscript to seven scholars for review.

29. After the receipt of favorable reviews of Massie's manuscript, Kent would and did falsely represent to massie that the "Administration" has ruled that outside scholars' reviews ("tenure letters") of Massie's manuscript were not acceptable as material for consideration by college committees.

30. Wolfe would and did call Massie at home on March 24, 1974, at 2 A.M., denying that she had made any such ruling against "tenure letters" with regard to manuscripts.

31. In the Spring, 1973, Ezorsky would and did suggest to a colleague that one sure way to deny Massie tenure would be to request Van Heijenoort to write a letter unfavorable to Massie.

32. In April, 1974, Kent would and did call Van Heijenoort in Mexico requesting him to review Massie's manuscript.

33. In April, 1974, Kent would and did falsely promise to Massie that if the Van Heijenoort review were negative, the Appointments Committee would not count it.

34. In April, 1974, Kent would and did send copies of Massie's manuscript to a number of outside scholars without Massie's permission, with a letter of transmittal soliciting negative criticism.

35. In April, 1974, Massie was interviewed by CRC subcommittee consisting of Fife and one other CRC member. Cannavo would and did falsely interpret Massie's file for Fife.

36. In April, 1974, Van Solkema would and did direct Massie not to discuss before the CRC the situation in the department since he had already briefed them.

37. On May 9, 1974, Appointments Committee would and did vote to deny tenure to Massie.

38. In June, 1974, after Kneller reappoints Jones and Rosenthal and removes Kent as Interim Chairman, Wolfe would and did block the appointment of Brown as Acting Chairman and would and did cause Kneller to appoint Cannavo as Acting Chairman of the Department.

39. In September, 1974, Appointments Committee would and did write a letter to the BHE objecting to Kneller's interference with departmental autonomy.

40. In October, 1974, Cannavo would and did cause Koslow to be the observer of Jones' teaching and Koslow would and did report unfavorably.

41. Cannavo would and did cause Edwards to be the observer of Korn's teaching and Edwards would and did report unfavorably.

42. Cannavo would and did attempt to have Edwards, then Ezorsky, then Koslow observe Rosenthal's teaching, when Edwards disqualified himself and none of the others was acceptable to Rosenthal, Cannavo would and did cause Taylor to observe Rosenthal's teaching.

43. In October, 1974, the Appointments Committee would and did vote not to reappoint Rosenthal prior to the observation of her teaching, even though Kneller had stated in reappointing her on June 16, 1974, that "further academic evaluation is warranted."

44. On October 2, 1974, Cannavo would and did schedule Jones' teaching observation conference thirty minutes prior to when he was to be considered for reappointment. The Appointments Committee would and did vote to deny Jones reappointment.

45. In October, 1974, Cannavo would and did cause Korn's teaching observation report to be withheld from him until after the Appointments Committee and the School Personnel and Budget Committee had acted unfavorably on his candidacy.

46. In October, 1974, Cannavo would and did attempt to prejudice the College Review Committee by sending to each member of the College Review Committee a copy of a "privileged" letter from Jones and Rosenthal to their attorney.

47. In the Fall of 1974, Cannavo and Ezorsky would and did attempt to cause the Union not to prosecute grievances on behalf of the plaintiffs and other members of the Department.

48. On November 27, 1974, Kneller would and did deny reappointment to Jones and Rosenthal, would and did

deny a Certificate of Continuous Employment to Korn, and would and did deny tenure to Massie.

49. On May 27, 1975, Kneller would and did deny the Step I grievance of Jones, Korn, Massie and Rosenthal.

50. Among the means by which Reich and Grossman participated in the aforesaid conspiracy were the following:

A. While Vice-President and Provost, Reich was made fully aware of the existing situation in the Department of Philosophy but took no action, made no attempt to investigate or correct the situation.

B. Letter from Massie and Jones, May 21, 1975, regarding the critical report on the operations of the Philosophy program at the Graduate Center and its relevance to the Philosophy Department at the College.

C. Letters (2) from Sprague to Reich, Fall of 1974, regarding the political situation in the Philosophy Department and stating the case for Jones, Massie and Korn.

D. Letter from Korn to Reich, Fall of 1974, objecting to the Appointment's Committee handling of Korn's candidacy for a Certificate of continuous Employment.

E. Letter from Jones to Kneller (forwarded by Kneller to Reich for action) December 17, 1974, raising fundamental problems with the procedures on joint appointments.

51. Reich chaired the College Review Committee at the time when the Jean Roane letter was sent to the Committee members by Cannavo during the week of October 7, 1974. Reich would and did refuse to strike consideration of that letter from the record.

52. Reich chaired the College Review Committee at the time when Paul Edwards, acting for the Appointments Committee, transmitted in November, 1974, the so-called "Second Van Heijenoort letter" to the College Review Committee. Reich would and did refuse to strike consideration of that letter from the record.

53. Reich authorized the spending of some $400.00 to obtain evaluations of Massie's manuscripts in November, 1974. Reich would and did authorize the spending of these funds after Massie had been denied tenure, and before he filed a grievance.

54. Reich would and did direct the response of the College to the censureship of the Philosophy Department and in so doing did misrepresent the plaintiffs' situation at the College.

55. Grossman, in his role as hearing officer for the College, reached decisions against the plaintiffs without conducting an investigation into the charges other than asking the the defendant-faculty to respond, and in his role as hearing officer for the College, would and did fail to set up impartial investigative procedures.

56. Grossman, in his role as a hearing officer for the College, would and did render a decision against Korn which included facts known by him to be false.

57. Grossman, in his role as representative of the College at Step II grievance level, did on May 2, 1974 maliciously induce an agreement between the College and Jones and Rosenthal which he knew would cause the failure of both to be reappointed in the future.

58. Grossman, at Step II grievance level, did on May 2, 1974 obtain Union Agreement to return Jones and Rosenthal to Step I, by deceiving the Union into believing that

the President wanted Jones and Rosenthal reappointed. At the same time, he obtained agreement from the Appointments Committee to return Jones and Rosenthal to Step I on his representation that failure to do so would result in either Jones or Rosenthal being reappointed at Step II.

59. Grossman, as Legal Assistant to the President, did aid and abet Wolfe in the preparation of her letter of March 30, 1975 to the American Philosophical Association which misrepresented the plaintiffs' situation at the College.

60. Grossman conspired with the defendant-faculty to insure that the denial of tenure to Massie would not be reversed by the Appellate Grievance Procedures by causing negative reviews of Massie's manuscript to be made after the record was established before the evaluating committees and before review by the grievance procedures.

COUNT TWO

The previous paragraphs of this amended complaint are hereby incorporated into Count Two as if they were fully set forth.

From May, 1972, through August, 1975, the defendants took certain actions the natural consequence of which denied and deprived the plaintiffs of rights guaranteed to them by the Constitution and Laws of the United States in violation of Title 42, United States Code, Section 1983.

COUNT THREE

The previous paragraphs of this amended complaint are hereby incorporated into Count Three as if they were fully set forth.

From on or about April, 1972, up to and including August 31, 1975, the defendants willfully, purposefully

and in pursuance of a conspiracy deprived the plaintiffs of the equal protection of the laws and the privileges and immunities secured to a citizen by the Constitution and Laws of the United States, in violation of Title 42 United States Code, Section 1985 (3).

Among the means by which the defendants would and did carry out the aforesaid conspiracy are those Overt Acts listed under Count One.

COUNT FOUR

The previous paragraphs of this amended complaint are hereby incorporated into Count Four as if they were fully set forth.

Each of the plaintiffs had a valid contract with the College for the Academic year ending August 31, 1974, and the defendants knew that these contracts existed.

Some time after May, 1973, and without reasonable justification, the defendants deliberately set into motion a series of events the natural consequence of which was 1) to interfere with the plaintiffs obtaining the benefits of their contracts and 2) to cause the Board of Higher Education to refuse (a) to renew the contracts of Jones and Korn and (b) to grant tenure to Massie, all of which substantially damaged the plaintiffs financially and professionally.

RELIEF

WHEREFORE, plaintiffs respectively request judgment against the defendants and each of them, as follows:

A) Declaring and confirming that the defendants' acts complained of herein are illegal and unconstitutional;

B) Declaring and confirming that the plaintiffs have been denied the equal protection of the law;

C) Declaring and confirming that the privileges and immunities of the plaintiffs have been abridged;

D) Declaring and confirming that the plaintiffs' right to free speech has been denied and deprived;

E) Delaring and confirming that the defendants intentionally interfered with the plaintiffs' contracts with the College;

F) Ordering and compelling the defendants to make whole the plaintiffs herein, including, but not limited to, providing reinstatement, tenure, appropriate back pay and financial compensation in an amount to be proved at trial, and providing other affirmative relief necessary to insure that the defendants never again infringe upon, and deny and deprive these plaintiffs from exercising their constitutionally protected right to free speech;

G) Awarding the plaintiffs, and each of them, compensatory and punitive damages from the defendants and each of them;

H) Awarding the plaintiffs and each of them from the defendants, and each of them, court costs and reasonable attorneys' fees.

I) Such other and further relief as to the Court may appear to be just and equitable.

Dated: New York, New York

ALPERT & O'ROURKE
By: MORTON ALPERT, Member of the Firm
Attorneys for Plaintiffs
Office & P. O. Address
217 Broadway
New York, New York 10007
Phone: (212) 349-2000

APPENDIX D.

Relevant Parts Of Agreement Between The Professional Staff Congress/CUNY And The Board Of Higher Education Of The City Of New York

PREAMBLE

AGREEMENT entered into this day of September, 1973, by and between the BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK (hereinafter referred to as the "Board", and the PROFESSIOSNAL STAFF CONGRESS /CUNY (hereinafter referred to as the "PSC").

WITNESSETH:

WHEREAS, the Board has had a long-standing policy that there exists an academic community of interest within the City University of New York ("CUNY") and that such community of interest includes the Instructional Staff, and

WHEREAS, the Board has been recognized as a "Public Employer" consistent with the terms and provisions of the Public Employees' Fair Employment Act of the State of New York, and

WHEREAS, the Board elected to come under the rules of procedure and regulations of the New York State Public Employment Relations Board, and

WHEREAS, a secret ballot election was conducted by the New York State Public Employment Relations Board and

WHEREAS, the members of the Instructional Staff in the unit hereinafter set forth freely selected the PSC as their

representative for the purposes of collective negotiations and the settlement of grievances, and

WHEREAS, the Board and the PSC subscribe to the following concepts of Academic Freedom:

(a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject.

(c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence, he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinion of others, and should make every effort to indicate that he is not an institutional spokesman.

(d) The above principles are recognizes as applicable to non-teaching members of the Instructional Staff, including counselors, to the extent their duties include research and publication of results, the selection of library or other educational materials or the formation of academic policy.

NOW, THEREFORE, it is agreed:

ARTICLE 1
RECOGNITION

1.1 The PSC is recognized by the Board of Higher

Education for the effective period of this Agreement as the exclusive collective negotiating representative under the Public Employees' Fair Employment Act for there persons in the following titles:
Professor
Associate Professor
Assistant Professor
Instructor

ARTICLE 2
BOARD—PSC RELATIONS

2.1 The Board and the PSC agree to maintain the academic character of the University as an institution of higher education.

2.2 The entire Agreement between the parties consists of the terms herein stated, and this Agreement terminates all prior Agreements and understandings. All Bylaws, policies and resolutions of the Board, and all Governance plans and practices of the Colleges and of the departments, as currently in effect, or as the same may be hereafter adopted, supplemented or amended, shall be subject to the said stated terms of this Agreement.

2.3 Nothing contained in this Agreement shall be construed to diminish the rights granted under the Bylaws of the Board to the entities and bodies within the internal structure of CUNY so long as such rights are not in conflict with a stated term of this Agreement.

ARTICLE 18
PROFESSIONAL EVALUATION

18.1 The evaluation of the professional activities of all employees in a public institution of higher education is essential to the maintenance of academic and professional standards of excellence. The purpose of professional evaluations shall be to encourage the improvement of individual professional performance and to provide a basis

for decisions on reappointment, tenure and promotions. An evaluation of professional activities shall be based on total professional performance. Written evaluations shall be on file for all employees.

18.2 (a) **Evaluation of a member of the teaching faculty** shall be based on total academic performance, with especial attention to teaching effectiveness, including, but not limited to, such elements as

1. Classroom instruction and related activities;
2. Administrative assignments;
3. Research;*
4. Scholarly writing;
5. Departmental, college and university assignments;
6. Student guidance;
7. Course and curricula development;
8. Creative works in individual's discipline;
9. Public and professional activities in field of specialty.

*It is understood that Lecturers (full-time) shall not be required to have a research commitment.

(b) *Teaching observation,* as described below, is one factor in total evaluation of academic performance of the teaching staff.

1. At least once during each academic semester, non-tenured and non-certified members of the teaching staff shall be observed for a full classroom period. One observation shall take place during any scheduled class during the first ten weeks of a semester. The employee shall be given no less than 24 hours of prior notice of observation. Tenured and certificated members of the teaching staff may be observed once each semester.

2. (a) Each department P & B committee shall designate a panel, the size to be specified by the Chairman, of department observers (which shall include members of the P & B committee). The department chairman shall schedule the members of this panel to conduct observations as necessary. Each observer shall submit, through

the department chairman, a written observation report to the department P & B committee within one week of the observation. These observation reports shall be considered by the committee in its total evaluation of the employee.

(b) The department chairman shall schedule a post-observation conference for the employee within two weeks after receipt of the written observation report. The post-observation conference shall include the employee, the observer and either a member of the P & B committee or a member of the department with the rank of tenured Associate Professor or tenured Professor to be assigned by the chairman.

(c) Following the post-observation conference, the assigned P & B representative or the assigned senior faculty member shall prepare a record of the discussion in memorandum form for submission to the chairman. The original conference memorandum shall be placed in the employee's personal file. The employee may have a copy of this document provided a signed receipt is tendered. The observation report shall be placed in the personal file.

(d) In the event that the observation or post-observation conference is not held within the time stipulated herein, the employee shall, within 10 working days thereafter, file an "observation/conference request form" with the chairman. A copy of the form shall be sent to the appropriate dean and the Office of the President. Failure of the employee to file within the stipulated time the "observation conference request form" shall bar the employee from subsequent complaint regarding such failure. Upon the receipt of the request form the college shall cause appropriate remedial action to be taken, including, if necessary, scheduling of an observation and/or observation conference by the Dean or President or their designee.

18.3 Annual Evaluations:

(a) Members of the teaching faculty: At least once each year, each employee other than tenured full professors

shall have an evaluation conference with the department chairman or a member of the departmental P & B committee to be assigned by the Chairman. Tenured full professors may be evaluated. At the conference, the employee's total academic performance and professional progress for that year and cumulatively to date shall be reviewed. Following this conference, the chairman or the assigned member of the P & B shall prepare a record of the discussion in memorandum form for inclusion in the employee's personal file. Within 10 working days after the conference, a copy of the memorandum shall be given to the employee. Where the overall evaluation is unsatisfactory, the memorandum shall so state. The employee in such case shall have the right to endorse on the memorandum a request to appear in person before the department P & B.

ARTICLE 20
COMPLAINT, GRIEVANCE AND ARBITRATION

20.1 **Intent:** The Board and the PSC agree to use their best efforts to encourage the informal and prompt settlement of complaints and grievances which may arise between the PSC, the employees, and the Board. The orderly process hereinafter set forth will be the sole method used for the resolution of all complaints and grievances.

20.2 **Definitions:** A complaint is an informal claim by an employee in the bargaining unit, or by the PSC of improper, unfair, arbitrary or discriminatory treatment.

A complaint may, but need not, constitute a grievance. Complaints shall be processed through the informal procedure herein set forth.

A grievance is an allegation by an employee or the PSC that there has been:

(1) a breach, misinterpretation or improper application of a term of this Agreement; or

(2) an arbitrary or discriminatory application of, or a

failure to act pursuant to the Bylaws and written policies of the Board related to the terms and conditions of employment.

20.3 **Informal Procedure for Handling Complaints:** Any employee in the bargaining unit may present and discuss his complaint either with or without a representative of the PSC. Similarly, a representative of the PSC may present and discuss a complaint on behalf of any employee or group of employees with the head of the department involved and shall be entirely informal. Any settlement, withdrawal or disposition of a complaint at this informal stage shall not constitute a binding precedent in the settlement of similar complaints or grievances.

20.4 **Formal Procedure for Handling Grievances:** Grievances may be filed by an employee in the bargaining unit on his behalf, or by the PSC on its behalf, or on behalf of any employee or group of employees in the bargaining unit. Grievances involving employees in more than one college of the University may be filed by the PSC initially at Step 2 of the grievance procedure.

A grievance must be filed by an employee or the PSC within thirty (30) days after the PSC or the employee on whose behalf the grievance is filed became aware of the action complained of, except that grievances concerning failure to reappoint shall be filed within twenty (20) working days of the scheduled date for notice of reappointment or non-reappointment. Any grievance or informal complaint not processed in accordance with the time limits specified herein shall be deemed waived by the grievant.

A grievance must be stated in writing setting forth the basis therefor with reasonable particularity, including a designation of the Article of the Agreement, the Section of the Bylaws, or the written policy of the Board relied upon, and the remedy requested.

Step 1. Grievances shall be filed with the President of the College affected or his designee. The President or his designee shall, within fourteen (14) calendar days of the

receipt of the grievance, meet with the grievant and a representative of the PSC for the purpose of discussing the grievance. The President or his designee shall, within fourteen (14) calendar days after the grievance meeting, issue his decision with reasons in writing to the grievant and the PSC.

Step 2. If the grievance has not been settled at Step 1, then within seven (7) calendar days after receipt of the written decision of the President of the College or his designee, or the expiration of the time limits for making such decision, the grievant or the PSC may submit the grievance in writing to the Chancellor or his designee, together with a copy of the decision of the President of the College affected, or his designee. The Chancellor or his designee shall, within fourteen (14) calendar days of the receipt of the grievance meet with the grievant and a representative of the PSC for the purpose of discussing the grievance. The Chancellor or his designee shall, within fourteen (14) calendar days after the grievance meeting, mail his disposition with reasons in writing to the grievant and the PSC by certified mail, return receipt requested.

Step 3. If the grievance has not earlier been settled, or if the Chancellor's disposition has not been issued within the time limits above set forth, the person or persons who submitted the grievance at Step 2 may appeal the Step 2 decision to Arbitration by serving written notice to that effect by certified mail, return receipt requested, directed to the Chancellor or his designee and to the American Arbitration Association within fourteen (14) calendar days after mailing of the Step 2 decision, or the last date for the mailing thereof. Arbitration shall be conducted in accordance with the rules of the American Arbitration Association and the laws of the State of New York, subject to the provisions of paragraph "20.5" hereof.

Supreme Court, U. S.
FILED
SEP 12 1980
MICHAEL RODAK, JR., CLERK

No. 80-240

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980.

JERE JONES, FRED KORN and DAVID MASSIE,

Petitioners,

-against-

JOHN W. KNELLER, individually and as President of Brooklyn College, SHERMAN VAN SOLKEMA, individually and as former Vice-President and Provost of Brooklyn College, ETHYLE R. WOLFE, individually and as Dean of the School of Humanities, Brooklyn College, SALVATOR CANNAVO, PAUL EDWARDS, GERTRUDE EZORSKY, EDWARD KENT, ARNOLD KOSLOW, ROBERT SCHWARTZ, PAUL TAYLOR, individually and as present and former voting members of the appointments Committee of the Philosophy Department at Brooklyn College, DONALD R. REICH, individually and as Vice-President and Provost of Brooklyn College and ROBERT GROSSMAN, individually and as Grievance Officer and Special Assistant to the President of Brooklyn College for Legal Affairs,

Respondents.

JERE JONES, FRED KORN and DAVID MASSIE,

Petitioners,

v.

BD. OF EDUCATION OF NYC, HAROLD JACOBS, CHAIRMAN Bd. of Ed., ROBERT KIBBEE, Chancellor of City University of N.Y.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ALLEN G. SCHWARTZ,
Corporation Counsel of
The City of New York,
Attorney for Respondents,
100 Church Street,
New York, N.Y. 10007.
(212) 566-4212 or 4338

LEONARD KOERNER,
TRUDI MARA SCHLEIFER,
Of Counsel.

No. 80-240

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980.

JERE JONES, FRED KORN and DAVID MASSIE,

Petitioners,

-against-

JOHN W. KNELLER, individually and as President of Brooklyn College, SHERMAN VAN SOLKEMA, individually and as former Vice-President and Provost of Brooklyn College, ETHYLE R. WOLFE, individually and as Dean of the School of Humanities, Brooklyn College, SALVATOR CANNAVO, PAUL EDWARDS, GERTRUDE EZORSKY, EDWARD KENT, ARNOLD KOSLOW, ROBERT SCHWARTZ, PAUL TAYLOR, individually and as present and former voting members of the appointments Committee of the Philosophy Department at Brooklyn College, DONALD R. REICH, individually and as Vice-President and Provost of Brooklyn College and ROBERT GROSSMAN, individually and as Grievance Officer and Special Assistant to the President of Brooklyn College for Legal Affairs,

Respondents.

JERE JONES, FRED KORN and DAVID MASSIE,

Petitioners,

v.

Bd. OF EDUCATION OF NYC, HAROLD JACOBS, CHAIRMAN Bd. of Ed., ROBERT KIBBEE, Chancellor of City University of N.Y.,

Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

Questions Presented for Review

1) In asserting that their employment by the College was terminated because of differences in philosophy of teaching technique, have petitioners, nontenured teachers, stated a constitutional issue?

2) Where the petitioners have received review of their candidacies for reemployment pursuant to the procedures set forth in the collective bargaining agreement, does the denial of reemploy-

ment at the conclusion of such procedures deprive them of due process?

TABLE OF CONTENTS

Page

Questions Presented for Review..... 2

Table of Cases 5

Statement of Facts..... 7

Opinion of the District Court
482 F. Supp. 204 (E.D.N.Y., 1979).... 11

Decision of the Court of Appeals
(unreported to date)..... 16

ARGUMENT: THE COURT BELOW PROPERLY DISMISSED THE COMPLAINT UNDER FED. R. CIV. P. 12 (b) (6) FOR FAILURE TO STATE A CAUSE OF ACTION, SINCE PLAINTIFFS HAVE ALLEGED NO CONSTITUTIONAL RIGHT DENIED THEM BY RESPONDENTS..... 16

Conclusion..... 29

TABLE OF CASES

Page

Board of Regents v. Roth, 408 U.S. 564 (1972)..... 15

Cervoni v. Secretary of Health, Education, and Welfare, 581 F. 2d 1010 (1st Cir. 1978)..... 25

Chitwood v. Feaster, 468 F. 2d 359 (4th Cir. 1972)... 12

East Hartford Ed. Ass'n v. Board of Education, 562 F. 2d 857 (2d Cir. 1977)..... 14, 19

Eichman v. Indiana State Univ. Bd. of Trustees, 597 F. 2d 1104 (7th Cir. 1979)..... 20,21,22

Faro v. New York University, 502 F. 2d 1229 (2d Cir. 1974)..... 20

Fluker v. Alabama State Board of Education, 441 F. 2d 201 (5th Cir. 1971)..... 17

Givhan v. Western Line Consolidated School Dist., 439 U.S. 410 (1979)..... 13, 18

LaBorde v. Franklin Parish School Board, 510 F. 2d 590 (5th Cir. 1975)..... 23

TABLE OF CASES (Continued)

Page

Matter of Agoglia v. Mulrooney, 259 N.Y. 462. 182 N.E. 84 (1932).....28

Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977)..... 18

Perry v. Sindermann, 408 U.S. 593 (1972)..... 15

Pickering v. Board of Education, 391 U.S. 563 (1968)..... 12,17

Scheuer v. Rhodes, 417 U.S. 232 (1974)..... 17

Webster v. Redmond, 599 F. 2d 793 (7th Cir. 1979)..... 24

Statement of Facts

The essential facts of the case, as described in detail in the Amended Complaint (Appendix C to Petition), are as follows.* Petitioners were non-tenured members of the faculty of the Philosophy Department of Brooklyn College, a unit of the City University of New York. In 1972, the faculty of the Department was divided into two factions, each espousing a different approach to teaching. Petitioners were in the so-called "minority" faction, which preferred the "journal" method over the "lecture" method

---

*Respondents moved for dismissal of the complaint under Fed. R. Civ. P. 12 (b)(6) for failure to state a claim upon which relief could be granted. For the purposes of that motion, the allegations of the complaint were deemed by the District Court to be true.

preferred by the so-called "majority" faction.

In May 1973, respondent Kent was elected to the Chairmanship of the Department. He was purportedly backed by the "majority" faction. In addition, respondents Cannavo, Ezorsky, Koslow, and Taylor, all of the "majority" faction, were elected to the Appointments Committee.

In October 1973, petitioners Jones and Korn, among others, were under consideration for reappointment to the faculty; petitioner Massie was under consideration for tenure. The Committee voted to reappoint Korn but not to reappoint Jones. Jones thereupon instituted grievance proceedings under the collective bargaining agreement.

Respondent Kneller, President of the College, granted a de novo hearing of the matter. In December 1973, the College Review Committee upheld the decision of the Philosophy Department's Appointments Committee not to reappoint Jones. In January 1974, respondent Kneller denied the grievance. Jones then initiated a Step II grievance; the administration agreed to remand the Step II hearing to the Step I level, without prejudice.

In February 1974, petitioner Korn informed Department Chairman Kent that he wished to be considered for the position of Assistant Professor and not for a Certificate of Continuous Employment ("CCE"), which permits an individual to continue teaching but does not give such individual

the security of tenure.

In March 1974, Kent requested that petitioner Massie submit his written material in connection with his application for tenure. In May 1974, the Appointments Committee voted to deny Massie tenure.

In June 1974, respondent Kneller reappointed petitioner Jones, stating in his Step I grievance decision that further academic evaluation was warranted. Soon afterward, respondent Cannavo became Acting Chairman of the Department.

In October 1974, petitioner Korn requested that he be considered for a CCE. The Committee voted not to recommend him for the CCE.

In November 1974, respondent Kneller notified petitioner Jones that he (Jones) would not be reappointed; notified petitioner Massie that he (Massie) would be denied tenure; and notified petitioner Korn that he (Korn) would be denied a CCE.

In December 1974, each petitioner initiated a Step I grievance. Hearings were held in March 1975. The grievances were denied in May 1975. Petitioners' last day of work for the college was August 31, 1975.

OPINION OF THE DISTRICT COURT

Judge NEAHER granted respondents' motion for dismissal of the complaint. He concluded that, even viewing the complaint liberally, it was "mani-

fest that the claims of constitutional violation asserted [were] insufficient on their face" (Appendix B to petition at 11a). He stated that petitioners did

> not claim they were denied reappointment for speaking publicly or privately in criticism of college policies. What is so apparent on the face of the complaint is an attempt to draw the court into a stale dispute admittedly between "two factions in the department [who] did have a constant disagreement as to the most appropriate method of teaching certain classes and certain students." (Appendix B to Petition at 11a.)

Judge Neaher found that such a dispute could not give rise to a violation of First Amendment rights, citing Pickering v. Board of Education, 391 U.S. 563 (1968); Chitwood v. Feaster, 468 F. 2d 359 (4th Cir. 1972).

Judge Neaher distinguished a recent decision of this Court, Givhan v. Western Line Consolidated School Dist., 439 U.S. 410, 99 S. Ct. 693 (1979), from the instant case in that the teacher in Givhan had "voiced criticism of employment policies and practices which she considered racially discriminatory"; such a situation was "essentially different from the interfactional controversy involved here" (Appendix B to Petition at 11a). Judge Neaher further held that not every claim asserted by a teacher requires an evidentiary hearing on the merits; since "teaching is by definition an expressive activity, every dispute over the best method of classroom instruction would raise First Amendment issues calling for federal court inter-

vention" (quoting from East Hartford Ed. Ass'n v. Board of Education, 562 F. 2d 857 (2d Cir. 1977) (Appendix B to Petition at 12a).

The Court also rejected petitioners' claim that their rights to due process had been violated. He found they had made no assertion that they had a property interest in re-employment nor that they had been deprived of any liberty interest. Judge Neaher also rejected the claim that petitioners had a constitutionally protected property interest in a fair hearing arising, they claimed, from the collective bargaining agreement between the petitioners' union and the Board of Higher Education. Judge Neaher held that acceptance of petitioners'

argument "would open to constitutional litigation a number of claims foreclosed by the decisions in [Board of Regents v. Roth, 408 U.S. 564 (1972)] and [Perry v. Sindermann, 408 U.S. 593 (1972)]", an "anomalous" result since petitioners had "not alleged a deprivation of either property or liberty sufficient to withstand a motion to dismiss" (Appendix B to Petition at 15a).

Judge Neaher also dismissed the conspiracy claim under Section 1983 (3), for failure to allege any class-based invidious discriminatory animus, and the "Monell" claim, against the Board of Higher Education and its officers, since there was not the required showing that petitioners had been dismissed by the College

because of an unconstitutional governmental policy.

Decision of the Court of Appeals

The Court of Appeals affirmed the judgment of the District Court "substantially for the reasons set forth in Judge Neaher's well-reasoned and carefully considered opinion..." (Appendix A to Petition at 2a).

ARGUMENT

THE COURT BELOW CORRECTLY DISMISSED THE COMPLAINT UNDER Fed. R. CIV. P. 12 (b) (6) FOR FAILURE TO STATE A CAUSE OF ACTION, SINCE PLAINTIFFS HAVE ALLEGED NO CONSTITUTIONAL RIGHT DENIED THEM BY RESPONDENTS.

Petitioners state correctly that the threshhold question is whether they are entitled to present evidence in support of their claim that their consti-

tutional rights were violated. Scheuer v. Rhodes, 417 U.S. 232 (1974); Petition at 5-6. That test was properly applied by the District Court, which after a careful review of the allegations in the complaint, dismissed the petition. (Appendix B to Petition at 4a). There must be a prima facie showing initially that petitioners assert rights protected by the constitution. See Fluker v. Alabama State Board of Education, 441 F. 2d 201 (5th Cir. 1971). Only when such rights have been pleaded can the question of respondents' alleged infrigement of those rights be investigated; only then can the courts apply the "balancing of interest formulae enunciated by this Court in Pickering v. Board of Education,

391 U.S. 563 (1968); Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977) and Givhan v. Western Line Consol. School District, [439 U.S. 410 (1979)]" (Petition at 5).

As petitioners themselves acknowledge, the basis of the suit is whether an intradepartmental debate "as to the best way to teach educationally disparate students in an open-admissions program of a publicly-supported university is constitutionally protected activity" (Petition at 6).

The Court of Appeals for the Second Circuit has held that the "mere" assertion "that one teaching technique is to be preferred over another . . . has no more to do with a constitutional

interest than would be a claim that closer 'rapport' could be achieved by arranging students' desks in a circle rather than in rows." East Hartford Ed. Ass'n v. Board of Education, 562 F. 2d 856, 857 (2d Cir. 1977). The Court went on to state that its

> role is not to choose the better educational policy. We may intervene in the decisions of school authorities only when it has been shown that they have strayed outside the area committed to their discretion. If [the teacher's] argument were to prevail, this policy would be completely eroded. Because teaching is by definition an expressive activity, virtually every decision made by school authorities would raise First Amendment issues for federal court intervention.

East Hartford, supra, 562 F. 2d at 859.

Thus, even if true, the claim that the sole reason plaintiffs did not

receive the appointments to which they believe they were entitled was their preference for one teaching method over another clearly does not raise a constitutional issue. Indeed, the question of faculty appointments itself is not per se of constitutional dimension. To the contrary, in Faro v. New York University, 502 F. 2d 1229, 1231-1232 (2d Cir. 1974), the Court of Appeals held that "of all fields, which the federal courts should hesitate to take over, education and faculty appointments at a University level are probably the least suited for federal court supervision."

Petitioners urge that the ruling in Eichman v. Indiana State Univ. Bd. of Trustees, 597 F. 2d 1104 (7th

Cir. 1979) supports their contention that their First Amendment rights were violated. As petitioners note, however, the plaintiff in Eichman had circulated memoranda critical of the University's practices and policies. It was these memoranda which provided the basis of the free speech claim. The Court found that the memoranda themselves constituted a constitutionally protected exercise of free speech; thus, the First Amendment claim could not be dismissed summarily; the Court went on to hold that, at trial, the University would be entitled to attempt to prove that plaintiff had not been rehired "because 'he was unwilling to accept and work within the reality dictated by budget restrictions and student enrollment'"; the Court implied

that such unwillingness would be deemed a permissible reason for non-renewal. Eichman, supra, at 1108, 1109.

In the instant case, petitioners do not allude to any particular statement or writing as the basis for their non-retention by the College. Rather, they insist they were not retained because of their views on teaching technique. This difference in approach is more nearly akin to Eichman's "unwillingness to work within reality" than it is to Eichman's critical memoranda.

This distinction is an important one. While petitioners may have a right to free speech, the College has a responsibility to operate the school in the manner it deems best, including

the determination of those faculty members it deems best able to effect school policy. See LaBorde v. Franklin Parish School Board, 510 F.2d 590 (5th Cir. 1975) (summary judgment granted). If advocacy of a particular teaching method were absolutely protected simply because it is in the form of speech, then the College would not be able to build around a faculty of its choosing. The College could not function at all if faculty members could obtain a sinecure simply by virtue of publicly expressing contrary views on academic policy within their department and the College. As noted by the District Court in the instant case, if the law were

otherwise (12a): "the door would be opened for countless appeals to federal judges to act as mediators in academic disputes - a task this court considers itself particularly unadapted to perform." Petitioners' real quarrel is that they believe the wrong choice was made. That is not a proper basis for action in the courts. See Webster v. Redmond, 599 F. 2d 793 (7th Cir. 1979).

(2)

Petitioners also claim that they were wrongfully terminated from their employment without due process of law. As the District Court noted, petitioners have made no showing that they have been deprived of any property interest as

non-tenured faculty members. Petitioners nonetheless claim that the provisions of the collective bargaining agreement between their union and the Board of Higher Education provide a property interest susceptible of protection by the Fourteenth Amendment guarantee of due process. This position is without merit. A procedure for review set forth in a contract is not in itself a property interest in the constitutional sense. "In order to constitute a property right, one must have a current valid expectation, based on the Government's implied promise to continue an entitlement, in an important, personal, monetizable interest." Cervoni v. Secretary of

Health, Education, and Welfare, 581 F. 2d 1010, 1018 (1st Cir. 1978) (emphasis added). It is this sort of interest which may not be removed without "due process"; the process due in a given case is intended to protect a particular predicate property right. In the instant case, however, there is no such right; petitioners have no constitutionally protected property right in retaining their positions on the faculty. The review procedures of the collective bargaining agreement may have been designed to afford some protection to non-tenured teachers, but it does not create property rights in the teaching positions. It is not disputed that petitioners did receive the review to which they were entitled under the collective

bargaining agreement between the petitioners' union and the Board of Higher Education. The fact that the contract may set out pre-termination procedures does not imply that petitioners thereby had property rights in the positions, such that "due process" principles apply.

Petitioners in fact do not claim that the procedure creates a property right in the positions. Rather, they claim, in effect, that the procedure per se is a property right in the constitutional sense and, therefore, that they cannot be deprived of the procedure without "due process." This is simply not so. The contractual procedure is not a substantive right; it is a procedure. If the petitioners are not satisfied with the results of the

procedure, the appropriate remedy is a proceeding in the state courts challenging the denial of the tenure on the grounds of arbitrariness or capriciousness. See Matter of Agoglia v. Mulrooney, 259 N.Y. 462, 182 N.E. 84 (1932).

Conclusion

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

September 11, 1980.

Respectfully submitted,

ALLEN G. SCHWARTZ,
Corporation Counsel of
The City of New York
Attorney for Respondents.

LEONARD KOERNER,
TRUDI MARA SCHLEIFER,
of Counsel.